

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

ORIGINAL

76-6122

To be argued by
IRVING LIKE

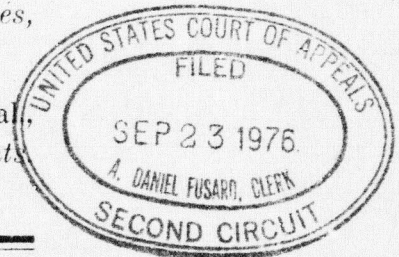
United States Court of Appeals
FOR THE SECOND CIRCUIT

COUNTY OF SUFFOLK, et al.,
Plaintiffs-Appellees,
against

DEPARTMENT OF THE INTERIOR, et al.,
Defendants-Appellants.

THE STATE OF NEW YORK and the NATURAL
RESOURCES DEFENSE COUNCIL, INC., et al.,
Plaintiffs-Appellees,
against

THOMAS S. KLEPPE, Secretary of the Interior, et al.,
Defendants-Appellants.



BRIEF OF PLAINTIFF-APPELLEE
COUNTY OF SUFFOLK
AND SUPPLEMENTAL APPENDIX

IRVING LIKE
Special Counsel for Appellee County
of Suffolk
200 West Main Street
Babylon, New York 11702

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THOMAS S. KLEPPE, Secretary of the Interior, et al.,
Defendants-Appellants.

**BRIEF OF PLAINTIFF-APPELLEE
COUNTY OF SUFFOLK**

Issue Presented

Whether the evidence taken at the hearings before the District Court supports its decision that the Secretary of the Interior violated the National Environmental Policy

Act, thereby warranting the issuance of a preliminary injunction preventing the consummation of Outer Continental Shelf lease sale 40 in the Baltimore Canyon of the Mid-Atlantic.

The question in this case is whether, in reaching his decision to accelerate OCS leasing and to hold Mid-Atlantic sale 40, the Secretary of the Interior complied with the statutory requirements governing his responsibilities as trustee and administrator of the public resources of the OCS.

This is more than a NEPA case because publicly owned lands are involved, and the duties of the Secretary must be found by reading together the various statutes whose policies and purposes are relevant to the development, management and protection of the natural resources of the OCS.

Some of the relevant statutes are cited in Paragraphs 6-8 of the complaint. Taken together, they clearly spell out the public interest in prudent development of the OCS non-renewable mineral resources, while protecting the living renewable resources of the offshore, nearshore and coastal environments for their various beneficial uses. The various statutes also breathe meaning and life into those provisions of the OCS Lands Act (43 U.S.C., Sec. 1331 et seq.) which require that the Secretary administer such Act in a way that will prevent waste and will promote conservation of the natural resources of the OCS.

It is our position that because the Secretary is a fiduciary charged with the administration of public lands and resources, he had a special duty to act prudently which was not subsumed in but rose higher than the NEPA responsibilities which confront other federal agencies.

Thus in judging whether the Secretary adequately discharged his NEPA obligations, the Court should give extra weight to the fact that the actions of the Secretary involve priceless public lands under his stewardship.

Knight v. United Land Association, 142 U.S. 161 (1891);
Sierra Club v. Department of the Interior, 398 F. Supp. 284, 8 ERC 1013 (D.N.D. Cal. 1975).

The Hearings in the District Court

The final Environmental Impact Statement (EIS) on sale 40 was filed by the Secretary on May 26, 1976. On June 30, 1976, the Secretary announced his intention to hold sale 40 on August 17, 1976. This precipitated motions by the plaintiffs-appellees for a preliminary injunction to prevent the Secretary from holding lease sale 40, citing as grounds the Secretary's violation of the National Environmental Policy Act (NEPA). Eleven days of evidentiary hearings on the preliminary injunction began on July 23, 1976 and continued until August 6, 1976. The motions for preliminary injunction were argued in the District Court on August 11, 1976, and "because of the need for a prompt decision", the District Court issued its memorandum of decision in draft form on August 13, 1976, only a few days after the close of hearings. (District Court Opinion, p. 12, A*21)

The District Court Opinion

The District Court found that there was one major area where the Secretary's decision was based on insufficient analysis of environmental dangers. This concerned the impact of possible State decisions affecting such matters as whether pipelines or tankers will need to be used and where onshore facilities can be located. The Court found that the Secretary had failed to consider local decisions in this regard that might have a substantial environmental impact, and the Court found that this issue was inadequately covered and virtually ignored in the Secretary's

* Appendix.

decision documents. (pp. 19, 31, 32; A 28, 40, 41) It was on the basis of this finding of the Secretary's failure to comply with the National Environmental Policy Act that the District Court issued a preliminary injunction. With the exception of this finding, the District Court concluded that the EIS fairly described the environmental impact of the proposed project. (p. 31; A. 40)

The defendants-appellants now attack the District Court's finding as to the Secretary's non-compliance with the National Environmental Policy Act, mistakenly asserting that the District Court otherwise found the Secretary's decision to be in full compliance with the National Environmental Policy Act.

We will demonstrate in this brief that the decision of the District Court:

- a. was correct for the reasons stated in its opinion;
- b. is supportable on grounds which were not reached by the District Court or which were overlooked or ignored by the District Court; and
- c. is supportable on grounds rejected by the District Court.

(Moore's Federal Practice, Volume 9, Paragraph 204.11(2), page 930; 204.11(3), pages 933, 934, 937, 938)

POINT I

The District Court opinion correctly ruled that the NEPA documents were defective because of their failure to adequately assess the substantial environmental and socio-economic impacts of the possible exercise of State and local powers affecting the use of pipelines or tankers and the location of OCS onshore and related facilities.

In their effort to upset the District Court's finding as to inadequate analysis of environmental impact,* the briefs of appellants rely heavily on references in the Sale 40 EIS, and Program EIS, which recognize that State and local governments have powers to control land uses associated with OCS activities and to force the use of tankers instead of pipelines. However, appellants entirely miss the point of the District Court's decision. It is true that the EIS's and PDOD's *identify* the relevant State and local powers. However, they do not meaningfully and adequately assess the substantial environmental and socio-economic *impact* of the possible exercise of such State and local powers and decision-making affecting such matters as whether pipelines or tankers will need to be used and where onshore facilities can be located. (Opinion pp. 19, 32; A. 28, 41)

The District Court noted that the impact of certain State actions may well negate some of the primary assumptions upon which the Secretary based his decision to proceed with leasing, in which event the leasing decision subverts the purpose of NEPA. (Opinion, pp. 35, 54; A. 45, 64)

Despite the references in the EIS's to pipelines and tankers, the EIS's contain inadequate assessment of the

* See for eg. Briefs of appellant National Ocean Industries Association, et al., pp. 24-36; New York Gas Group pp. 9-13; Federal appellants pp. 16-21.

impact which would result if State laws severely restrict pipelines and related onshore facilities. (p. 63; A. 73)

At the time of his decision to proceed with Sale 40, the information which the Secretary had did not permit a sound judgment as to what the five coastal States would sanction with respect to the onshore activity and coastal development accompanying OCS exploratory drilling and production. (pp. 65, 66; A. 75, 76)

Since the EIS's do not analyze the State provisions and the probable extent of State cooperation or opposition, a realistic appraisal of the impact of Sale 40 on the environment is not possible. (p. 66; A. 76)

The District Court gave examples of impacts which would result from certain State decisions, and their effect on the Secretary's decision-making process.

"Even if the states do not prohibit oil pipelines, they may restrict their point of entry, requiring a landfall, for example, at the industrialized northern section of the New Jersey Coast or at the refinery areas in the tri-state New Jersey-Delaware-Pennsylvania region. Such a decision would require a reconsideration of whether tracts other than those proposed in Sale 40 should be leased. It might, for example, improve the revenue from lease sales, decrease pipeline lengths, and reduce environmental impacts if tracts nearer the allowable pipeline landfalls were utilized in this first leasing.

If the assumption by the Secretary that pipelines will transport the oil in case of a large strike would have been different had the state situation been brought home to him, then the entire NEPA decision-making process is invalidated. Misplaced reliance on such a material proposition raises a question as to the adequacy of the NEPA documents and the reliability of the Secretary's decision." (Opinion 66, 67; A. 76, 77)

These are only a few of the impacts flowing from possible State and local decisions which were not analyzed in the Secretary's NEPA documents.

There are other socio-economic impacts which would result from State restrictions on pipelines, that were not analyzed in the NEPA documents. For example, if restrictions on pipelines necessitated increased use of tankers, the cost of OCS production and operations would increase because tankers are more costly than pipelines. Increased costs affect the amounts which would be bid for OCS leases. Increased use of tankers and higher costs of OCS production and operation would put independent and smaller oil companies at a competitive disadvantage vis a vis the major oil companies, who own or control the bulk of tanker tonnage and have superior lease bidding ability by virtue of their greater capital resources.

Restrictions or delays in pipeline entry may also delay production and increase costs with the attendant socio-economic impacts previously noted. The uncertainty and increased cost inherent in possible State and local restrictions on pipelines and other OCS related onshore facilities may also be reflected in lower amounts bid for OCS leases. Furthermore, if pipelines are permitted in certain locations and not others, the effects might be to favor certain major oil companies who have nearby refineries and onshore support or related facilities which would give them an undue anti-competitive advantage over others.

These are only a few samples of the types of impacts which should have been but were not analyzed in the NEPA documents.

Whatever discussion there was of the impact of increased use of tankers which would result from pipeline restrictions, was of a meager nature expressed only in very general superficial terms of increased tanker traffic and oil spills, and of no value to the Secretary or to State and local decisionmakers concerned with coastal zone planning.

POINT II

The District Court did not reach and decide the issue of whether the Secretary had adequately evaluated the need for and alternatives to OCS lease sale 40.

NEPA, Section 4332 provides in pertinent part that:

“(2) all agencies of the Federal Government shall—

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the *environmental impact* of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) *alternatives to the proposed action*,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable *commitments of resources* which would be involved in the proposed action should it be implemented.

Prior to making *any detailed statement*, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. *Copies of such statement* and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards,

shall be made available to the President, the Council on Environmental Quality and to the public as provided in section 552 of title 5, United States Code, and *shall accompany the proposal through* the existing agency review processes;

(D) study, develop and describe *appropriate alternatives* to recommended courses of action on any proposal which involves *unresolved conflicts* concerning alternative uses of available resources." (emphasis added)

The Court below acknowledged the presence of the issue of whether the Secretary had adequately considered certain alternatives to rapid OCS production (cognizable under NEPA, Section 4332(2)(c)(iii) and Section 4332(d)).

"There is, too, the issue of the wisdom of commitment to rapid exploitation of offshore oil resources while Congress is debating energy and conservation problems. New policies may require saving these non-renewable hydrocarbon resources for future generations." (p. 9; A. 18)

The Court recognized the sensible alternative of pursuing energy conservation and holding the OCS oil and gas as a reserve to achieve future oil supply security, instead of draining such precious resources now.

"No doubt many would applaud adoption of sensible alternatives such as inducing the exercise of restraint in our profligate use of energy, while holding these precious OCS non-renewable fossil fuel resources for coming generations when energy may be in even shorter supply than at present." (p. 31; A. 40)

Despite its awareness of the "alternatives issue", the Court never reached it in its decision. It decided the case solely on the issue of whether the EIS adequately described

the possible environmental difficulties (cognizable under NEPA Section 4332(2)(c)(i) and (ii). The Court treated the environmental impact issue as *the* issue for decision. The Court said:

"But, on balance, the impartial reader of the EIS's is driven to the conclusion that, within the limit of reasonable researchers and writers, a studied effort was made to present a fairly grim picture of *possible environmental difficulties*. If anything, the studies are almost too detailed and encyclopedic for a lay executive to fully comprehend. The Final EIS sale No. 40, together with the PDOD prepared by staff to summarize and clarify *the issue for decision* satisfactorily meet both the spirit and the letter of NEPA requirements in all respects except one addressed below." (p. 31; A. 40) (emphasis added)

It is likely that the Court did not reach the "alternatives issue" because the emergency nature of the hearings and the extreme difficulty in the brief period of 11 days of hearings to adequately evaluate the torrential volume of evidence placed before it concerning the inadequacy of the EIS treatment of the "alternatives issue". Obviously, it was the Secretary's rush to hold Sale 40 at the earliest time permitted by law which curtailed the length of the hearings below, forced and sped their pace, and created the need for prompt decision, thereby preventing the District Court from reviewing all of the evidence.

As the District Court noted:

"There is little point in a detailed review of the evidence taken at the hearings in this Court. There were hundreds of thousands of pages of exhibits, many volumes of draft and final EIS's, and the thousands of pages of testimony from distinguished scientists, economists, administrators and others respecting the adequacy of the EIS's." (p. 30; A. 39)

One may reasonably conclude that the Court failed to make a detailed review of the evidence on the "alternatives issue", because it did not have to decide that issue and did not have the time to do so. The Court, having taken up the environmental impact issue as "the issue for decision", found the Sale 40 EIS and PDOD satisfactory (as to description of environmental impacts) with the exception that it failed to consider possible State and local decisions that might have a substantial environmental impact. (pp. 19, 31, 32, 62, 63, 65-67; A. 28, 40, 41, 72, 73, 75-77)

Thus, the Court never decided the "alternatives issue" and its decision may not be interpreted as a finding that the decision documents (i.e. the EIS's and PDOD's) satisfactorily met both the spirit and the letter of NEPA requirements in all respects regarding this issue.

On the contrary, a detailed review of the evidence taken at the hearings on the alternatives issue clearly and indisputably discloses that the EIS's and PDOD's fail to comply with NEPA because the Secretary failed to adequately assess the need for and alternatives to rapid OCS oil and gas leasing and drilling.

The case law reviewed by the District Court confirms that it was preoccupied primarily with the environmental impact issue and did not intend to reach and decide the alternatives issue.

None of the cases cited by the Court in its opinion deals with the alternatives issue, as it was raised by the evidence taken at the hearings.

The cases relied on by the Court mainly interpret NEPA's requirements as to the Secretary's duty concerning disclosure of *environmental effects and factors*. (Section 4332(2)(c)(i) and (ii))

The Court did not cite, interpret and apply the considerable body of case law pertinent to the Secretary's duty

under Section 4332(2)(C)(iii), Section 4332(D) to adequately consider and evaluate *alternatives* to the proposed action.

POINT III

NEPA and the case law prescribe standards of adequacy concerning an EIS's description and assessment of alternatives which were not complied with by the Secretary.

The evidence taken by the District Court on the issue of alternatives to proposed OCS lease sale 40 discloses that the decision documents relied upon by the Secretary as the basis for his proceeding with lease sale 40 fail to meet the standards of adequacy laid down by NEPA and the case law. As will be shown in the points which follow, the District Court failed to interpret and apply these standards to the decision documents and, hence, did not reach or decide the alternatives issue.

As earlier indicated, the appropriate sections of NEPA concerning the Secretary's duty to consider alternatives are Section 4332(2)(C)(iii) and Section 4332(D).

The case law applicable to the adequacy of an EIS concerning its description and assessment of alternatives lay down the following standards of adequacy.

1. The requirement for a thorough study and a detailed description of alternatives laid down by NEPA Section 4332(C)(iii) and Section 4332(2)(D) is the linch-pin of the entire impact statement.

Monroe County Conservation Council v. Volpe,
472 F.2d 693, 697-698, 4 ERC 1886 (2d Cir.
1972).

2. The agency decisionmaker must take into proper account all possible approaches to a particular project in-

cluding total abandonment of the project which would alter the environmental impact, and the cost-benefit balance, so that the most diligent and optimally beneficial decision will ultimately be made.

Calvert Cliffs Coordinating Committee v. AEC, 449 F.2d 1109, 1114 (2 ERC 1779) (D.C. Cir. 1971);

I-291 Why? Association v. Burns, 372 F. Supp. 223; aff'd 517 F.2d 1077; 6 ERC 1275, 1293 (D. Conn. Feb. 7, 1974); aff'd 7 ERC 2147 (2d Cir. May 30, 1975).

3. The EIS must discuss such alternatives to the proposed action as may partially or completely meet the proposal's goal.

NRDC v. Callaway, 524 F.2d 79, 93 (2d Cir. 1975).

4. Mere passing mention by the agency of possible alternatives to the proposed action in a conclusory and uninformative manner, without indicating the basis for such discussion of alternatives, renders an EIS fatally inadequate.

Monroe County Conservation Council, supra at 697;

Silva v. Lynn, 482 F.2d 1282, 1287, 5 ERC 1654 (1st Cir. 1973);

Chelsea Neighborhood Associations v. U.S. Postal Service, 389 F. Supp. 1171, 7 ERC 1707, 1716 (D.S. D.N.Y.) (Feb. 25, 1975); aff'd 516 F.2d 378 (April 30, 1975) (2d Cir.).

5. The scope or range of alternatives which the Secretary must discuss concerning offshore oil leasing projects includes even alternatives outside his cognizance and those beyond his power or authority to adopt or implement (such as the elimination or reduction of oil import quotas), even

if consideration of such alternatives requires a weighing of numerous matters such as economics, foreign relations and national security.

Natural Resources Defense Council v. Morton, 458 F.2d 827, 3 ERC 1558 (D.C. Cir. 1972).

6. The EIS must be sufficiently inclusive and informative in its description and factual discussion of the merits of each alternative to allow the Secretary to make a reasoned choice, and to judge the merits of each alternative and to make an informed choice to proceed with the project; the EIS will not suffice if it provides only generalities and self-justification.

NRDC v. Morton, supra at 836;
I-291 Why?, supra at 1296, 1297;
Brooks v. Volpe, 250 F. Supp. 269, 278 (4 ERC 1492) (W.D. Wash. 1972);
Chelsea Neighborhood Associations, supra, 7 ERC 1957 at 1964.

7. Alternatives that present only partial solutions to environmental problems and which may not meet all of the project's objectives must nevertheless be discussed in the EIS.

Sierra Club v. Froehlke, 359 F. Supp. 1289, 1344, 5 ERC 1033 (S.D. Tex. 1973).

8. A good faith discussion of alternatives is necessary to inform the decisionmakers and the public of all possible options, and is not to be employed to justify a decision already reached.

City of Boston v. Volpe, 464 F.2d 254, 257 (4 ERC 337) (1st Cir. 1972);
Keith v. Volpe, 352 F. Supp. 1324 (4 ERC 1350) (C.D. Cal. 1972);

Jones v. D.C. Redevelopment Land Agency, 499 F.2d 502, 6 ERC 1534, 1539 (D.C. Cir. April 26, 1974).

9. The EIS must contain a detailed discussion of all other reasonable alternatives to a proposed project prior to the "irreversible and irretrievable commitments of resources" so that the responsible decisionmakers are aware of the environmental "trade-offs" that may occur when one course of action is chosen over another.

Environmental Defense Fund Inc. v. Froehlke, 473 F. 2d 346, 350 (4 ERC 1829) (8th Cir. 1972).

Section 4332 (2)(D) is supplemental to and more extensive in its commands than the requirement of Section 4332 (2)(C)(iii). It was intended to insist that no major federal project should be undertaken without intense consideration of other ecologically sound courses of action, including shelving the entire project or of accomplishing the same result by entirely different means.

Trinity Episcopal School v. Romney, 523 F.2d 88, 8 ERC 1033, 1036, 1037 (2d Cir. 1975);
EDF v. Corps of Engineers (Tombigbee), 492 F.2d 1123, 6 ERC 1513, 1520 (CA 5 Jan. 19, 1974).

In the recent case of *Aeschliman et al. v. United States Nuclear Regulatory Commission, et al.* (D.C. Cir.) Nos. 73-1776, 73-1867, July 21, 1976, the Court held defective an EIS which failed to examine energy conservation (including measures for reducing consumer demand) as an alternative to constructing two nuclear power plants to generate electricity and steam.

The Court set forth the nature of an agency's NEPA obligation to assess alternatives (such as energy conservation) to the proposed action and restated some of the standards which comprise the test of adequacy of the EIS regarding consideration of alternatives.

The Court stated:

"... An alternative cannot be ignored simply because it would not totally alleviate the need for a proposed facility.

... Nor is it appropriate, as Government counsel argues, to disregard alternatives because they do not offer a complete solution to the problem. If an alternative would result in supplying only part of the energy that the (proposal) would yield, then its use might probably reduce the scope of the . . . program and thus alleviate a significant portion of the environmental harm attendant on (it)." (*NRDC v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972))

POINT IV

The decision documents fail to adequately consider the alternative of increasing Gulf of Mexico oil and gas production through efforts to develop and produce reserves on:

- A. Producible, shut-in leases**
- B. Non-producing reservoirs**
- C. Drilling new wells in currently producing oil and gas reservoirs**
- D. Increasing production from existing producing wells up to levels approximating their respective MPR's (maximum production rates)**

If these efforts were to occur, concomitant increase in OCS production would be greater than that which might derive from OCS sale 40 in the Mid-Atlantic.

The decisions to accelerate OCS leasing and to hold lease sale 40, irrespective of the outcome of any NEPA review, foreclosed any serious and careful examination of

the alleged need for, and alternatives to, OCS leasing in the Mid-Atlantic lease sale 40 area.

This was clearly brought out in the testimony of economist, George Donkin. (Ex. 73)

Mr. Donkin testified that there were superior alternatives to holding OCS sale 40. These alternative sources of oil and gas include non-producing leases in the Gulf of Mexico at which gas reserves have already been drilled and discovered, non-producing gas reservoirs at producing leases in the Gulf, producing reservoirs in the Gulf of Mexico, both oil and gas, which currently are not being produced at anywhere near their maximum predictive capacity, plus an extremely large inventory of leases not categorized in the preceding categories, many of which have not yet been subjected to exploratory leasing. (Donkin T. 1743, 1744) (SA.* 26, 27)

Donkin testified that development in the Gulf of Mexico is not taking place at the optimum level and that holding OCS Sale 40 in August 1976 will exacerbate the problem. (T. 1771; A. 704) There are many new, recently acquired leases in the Gulf of Mexico, significant discoveries being announced frequently, as for example a tract acquired in May 1974, which may be the Gulf's largest oil and gas field. (T. 1771-1772) (A. 704-705) The combination of newly acquired leases, 1700 active leases in the Gulf of Mexico, and unleased acreage, will increase the demand on drilling equipment, platforms, rigs and manpower. (T. 1772) (A. 705) The holding of lease sale 40 this month would place a large drain on the industry's ability to raise capital for both sale 40 and the Gulf of Mexico activity (T. 1772) (A. 705) Donkin stated his opinion that it would be better and more productive to use the \$400 to \$600 million estimated bonuses to be paid on lease sale 40 and invest it in physical exploration and production in the Gulf of Mexico, whose oil

* Supplemental Appendix.

and gas can be brought on stream at higher levels at much sooner rates, and with more certainty of finding oil and gas reserves than in the Mid-Atlantic. (T. 1772; A. 705) (T. 1773-1775; SA. 28-30) (T. 1808; A. 706)

On the other hand, as the Court observed, if lease sale 40 goes through, there would be roughly half a billion dollars frozen into government funds and not presumably in oil exploration or production. (T. 1775; SA. 30) Donkin put it succinctly:

"I am suggesting that we would in all probability develop far more oil and gas, and much sooner, in the Gulf of Mexico for equivalent expenditure where we simply were to continue to develop the non-producing—the producible shut-in reserves and leases, reservoirs and leases, and increase production at producing reservoirs were (sic) appropriate up to levels approximating the maximum desirable rate of production." (T. 1775; SA 30) (See also T. 1809; SA 38; T. 1810; A. 707)

Donkin indicated that there was no pressing need for Sale 40 and that under his analysis of the alternatives, the decision to lease sale 40 could be postponed 3-5 years. (T. 1775, 1776; SA 30, 31)

In response to questions from the Court, Donkin testified that the alternative of separation of exploration and production was a viable superior alternative to holding lease sale 40 at this point (T. 1776-1778) (SA 31-33), and that instead of tying up a half billion dollars of capital for lease sale 40 this month, if the government or anybody laid out a hundred billion, they could, at a cost of \$3 million per well, drill about 30-45 exploratory wells and explore the Sale 40 area and obtain a pretty good idea of its potential. (T. 1774-1777) (SA 29-32)

"It seems to me that it would be far superior to have the government drill maybe 15 to 30, 35 wells out

there and get a pretty good idea as to what in fact the potential is than to lease it in this point of time." (T. 1777) (SA 32)

Donkin also described as a viable alternative, that the government would purchase the seismographic, geological and geophysical data, and interpret it, or contract out to other consultants who interpret such data, or the government could contract out to the drillers and, based upon the results of the initial drilling, make a determination as to where for example, if at all, the ultimate reserves lie relative to the range of estimates contained in the PDOD. (T. 1777-1778) (SA 32-33)

Donkin stated that the PDOD-Sale 40 did not discuss the most useful way of using the half billion dollars at this point, and that it did not consider the alternative of additional development in the Gulf versus frontier areas. Furthermore, Donkin pointed out that the sale 40 PDOD did not address the impact that sale 40 would have on the capital necessary to develop the Gulf of Mexico, the on-shore fields, to complete the last Canadian pipeline, and things of this nature. (T. 1784) (SA 37) He also testified that the Programmatic PDOD didn't consider the possibility of enhancing the Gulf of Mexico production at all. (T. 1779) (SA 34)

Donkin testified that the Secretary of the Interior could not make an intelligent decision based upon the documents that he had, and that a reasonable set of alternatives understandable by a lay person could have been put together with the data now available for presentation to a decision maker. (T. 1781-1782) (SA 35-36)

With regard to natural gas, Donkin testified that there were shortages at existing prices, and curtailments, but that it was not of crisis proportions. He stated that the recent FPC increase in the price of new gas would increase its supply and that there would be significant increases in

production in the near term if producible shut-in leases were brought on-stream, and if new well completions took place. (T. 1814, A. 708) (T. 1815; SA 39)

He made an extremely conservative estimate of 6 trillion cubic feet of reserves relative to producible shut-in leases, and that from the 2 sources—producible shut-in leases and the non-producing dedicated reservoirs, there will be roughly one trillion cubic feet a year during the first year, or 2.7 million cubic feet per day (i.e. 2739 MMCF). (T. 1825, 1826) (SA 41, 42)

Donkin testified that the amount of daily deliverability of natural gas from the offshore Louisiana producible shut-in leases and non-producing gas reservoirs which are dedicated to interstate pipelines would account for 5040% of Transcontinental Gas Pipeline Corp.'s projected deficiency during the winter heating season, November 1976 through March 1977. (T. 1836) (SA. 43) (Transcontinental is the company which serves the New Jersey and New York area (T. 1821) (SA. 40) and the intervenor gas industry.)

Donkin further testified that he made a comparison of the expected gas yield from OCS lease sale 40, and his calculations of what could be yielded if the producible gas at producible shut-in wells and dedicated reservoirs were brought up to optimal utilization. He said:

"If the gas reserves estimated for Sale 40 are at the low end of the range, then the offshore producible shut-in leases and non-producing reservoirs would account for approximately 317,000—or 317 percent of the peak daily capacity to be attained in 1989 for Sale 40 . . . At the high end of the range for Sale 40 the Gulf of Mexico leases would account for 87 percent of that figure." (T. 1838, 1839) (SA 44, 45)

As a further means of dealing with the natural gas shortfall, Donkin testified that if the low priority intra-

state use were devoted to the high priority industrial—or higher priority industrial and home use, that much of the shortfall would be overcome. He said that if natural gas service to generate electricity were either ceased within the near future or phased out, that would free up rather large volumes of gas to serve the higher priority uses, and it would probably eliminate all curtailments, and that if the price of gas were raised up to the alternative fuel cost, it would have the effect of phasing out the use of natural gas to generate electricity. (T. 1840, 1841; SA. 46, 47) (T. 1842; A. 709) (T. 1843; SA 48)

Mr. Donkin's testimony was documented in considerable detail by Plaintiff's Ex. 73.

<i>Subject</i>	<i>Exhibit Citation (Page)</i>
Active OCS oil and gas leases	6
Producible shut-in leases	17
Relative magnitude of reserves associated with producible shut-in leases in Gulf of Mexico	21
Estimated gas reserves	22
Comparison between OCS sale 40 estimated gas reserves and those from producible shut-in leases	23
Evidence that production from existing offshore leases in the Gulf of Mexico could be significantly enhanced	27
FPC study of extent to which production from non-producing offshore reserves could be accelerated	29
Evidence that Gulf of Mexico OCS oil and gas production from currently producing reservoirs could also be enhanced	31

<i>Subject</i>	<i>Exhibit Citation (Page)</i>
Large gap between actual production and MER and MPR	31-41
Gap indicates that through additional development drilling production from the OCS could be dramatically accelerated within a short period of time	41
Estimated costs of increasing MER level of production from the current level of production	45
Benefits of accelerated production through developmental drilling would greatly exceed the incremental costs of that activity	48
Estimates of acceleration in production capability, measured in terms of additional MPR that would obtain if new wells were completed in selected reservoirs in 4 producing areas of the Gulf of Mexico	50
Increase in OCS production resulting from efforts to develop and produce reserves on	
(A) Producible, shut-in leases,	
(B) Non-producing reservoirs	
(C) New wells in currently producing oil and gas reservoirs	
(D) Increase in production from existing wells up to levels approximating their MPR's	

<i>Subject</i>	<i>Exhibit Citation (Page)</i>
—would be greater than the increase in OCS production which might derive from Sale 40	53
The alternatives to Sale 40 would result in accelerated OCS production taking place sooner than were petroleum and natural gas to be found in commercial quantities in the Mid-Atlantic	54
It is possible that not holding sale 40 will result in greater levels of domestic production between now and 1985 than would obtain were the sale to be held as scheduled	56
Accelerated offshore leasing in the Mid-Atlantic will exacerbate the problem of insufficient development activity in other OCS areas	59
Speculative withholding of natural gas supplies in anticipation of future price increases motivates deferral of development and/or production from existing supplies	60
The Programmatic PDOD did not present an adequate assessment of the future energy potential of conventional onshore petroleum sources	63

No witness refuted Donkin's testimony in any essential particular. In fact, Mr. Eugene H. Luntz, President of the Brooklyn Union Gas Company, confirmed the superiority of the alternatives described by Donkin to holding lease sale 40 now.

Luntley admitted that if it were possible to increase production from producible shut-in leases or non-producible dedicated reservoirs, gas would be flowing into New York gas consumption markets within 2 years—sooner than the gas, if any, that could be derived from OCS sale 40. (Luntley T. 2322, 2323) (A. 767, 768)

Cross-examination of Luntley revealed that his estimates of natural gas deficiencies through 1985 (Defendants' Ex. CC) were overstated in that they were based on an assumed \$.52 price level and did not reflect the significant additional gas supplies that would be forthcoming in response to the FPC's recently approved increase of price to \$1.42. (T. 2323-2327) (A. 768-772)

Luntley's estimates are also questionable because he did not take into account the possible reduction of gas demand due to mandatory energy conservation measures. (T. 2330-2332) (A. 773-775)

Defendants' claims as to natural gas shortages must also be discounted to the extent that the industry's estimates of reserves have been found by a Congressional investigating committee to be understated, unreliable and misleading (T. 2333-2336) (A. 776-779) (P. Ex. 115 at pp. 32-36)

Additional reasons for skepticism as to defendants' claims regarding natural gas shortages stem from the findings of another Congressional Committee which inquired into the causes of the decline in deliverability of natural gas at the Bastian Bay field in Louisiana, and concluded that the two producers have failed to take appropriate steps to accelerate production of the field, and that gas producers which anticipate higher prices as a result of contemplated deregulation of natural gas prices have failed to do needed work in order to maintain deliverability. (T. 2336-2340) (A. 780-784) (P. Ex. 116)

The evidence presented by Donkin proves conclusively the utter failure of the Secretary, in violation of NEPA,

to carefully consider and evaluate the need for OCS sale 40, alternative sources of oil and gas supply in other domestic areas within his jurisdiction and authority, and the effect of opting for OCS sale 40 without analyzing its effect on Gulf of Mexico production, and without making a cost-benefit comparison for the purpose of assessing the relative priorities to be assigned to OCS sale 40 as compared to the alternatives described by Donkin.

The alternatives described by Donkin were alternatives within the jurisdiction of the Secretary, whose effect can be reasonably ascertained and whose implementation was not remote and speculative. Failure of the NEPA documents to set forth the Donkin alternatives precluded the Secretary from considering a range of alternatives sufficient to permit a reasoned choice, and constituted a violation of NEPA.

POINT V

The decision documents fail to adequately evaluate available sources of oil and natural gas from Arab sources, non-Arab sources within OPEC, other foreign sources, and domestic sources.

FES—Sale 40 assumes insecurity of foreign oil imports (V. 2, 562, 576) and states that the oil import option is the least acceptable for continued energy independence (V. 2, 564).

The PDOD—Sale 40 (Appendix A, p. 2) also assumes that the OCS—Sale 40 development option will reduce vulnerability of the U.S. to severe supply disruptions and high oil prices.

The evidence presented by Newlon and Donkin highlighted the inadequacy of the treatment of these issues.

In addition, the affidavit of Christopher Rand, an expert on Middle Eastern history and energy policy, received in

evidence as P. Ex. 76 negates the contentions of the PDOD, and shows that it

- 1) fails to evaluate foreign oil sources, and to show to what extent they are unreliable, or document U.S. vulnerability to them (pp. 17-30);
- 2) fails to evaluate alternate sources of oil and natural gas outside OPEC, including domestic sources on U.S. government land in Northern Alaska, California's OCS, Naval Petroleum Reserves 1 & 4, and other federal lands in New Mexico, and the Rocky Mountain areas of Colorado, Utah, Wyoming and Montana. (pp. 30-40)

In fact, Rand shows that sources exist elsewhere in the United States and in foreign countries outside OPEC, to provide the 3 million barrels of oil and 2 million barrels of oil equivalent which the PDOD states (p. 4) could be derived from accelerated OCS leasing.

"... 2.2 million barrels a day from secondary recovery, mostly of heavy oil; 400,000 to 600,000 barrels a day from the Alaskan North Slope, surplus to the needs of the West Coast; 725,000 barrels a day additional production from existing fields in the Gulf of Mexico; 400,000 barrels a day from Elk Hills (Naval Petroleum Reserve 1 in California); 250,000 barrels a day from the Santa Ynez Unit in the Santa Barbara Channel; and the balance, or 725,000 to 925,000 barrels a day, from the North Sea and the Reforma area of Mexico." (p. 40)

POINT VI

The decision documents inadequately evaluate the alternative of conserving OCS sale 40 oil and gas resources for future use rather than using it up now.

In his affidavit (P. Ex. 72), Dr. Newlon said that the PDOD made a static and misleading comparison of the sum of the price and the environmental costs of OCS oil with each of the major substitute sources of energy (e.g. oil imports), and with the cost of energy conservation, because the comparison did not consider the implications of resource use now for future resource availability. In other words, the PDOD failed to consider the crucial question—will oil from the OCS be more valuable now, or will it be more valuable to the U.S. consumer at some time in the future. (Ex. 72, pp. 3, 4).

At the hearing, Dr. Daniel Newlon testified that insufficient consideration was given to the possibility that in making the decision regarding OCS leasing, the Secretary should:

“at least consider this possibility that we are being spendthrift, that we should postpone and lease at a later date.” (Newlon T. 1665, 1666) (A. 691, 692)

He testified that inadequate analysis was made. Dr. Newlon made these points:

- 1—The PDOD did not discuss the uncertainty, the range of opinions that exist about the different projections it was discussing. (T. 1645) (SA 15)
- 2—The PDOD's discussion of the conservation option was misleading. (T. 1645) (SA 15)
- 3—The PDOD did not address the existence of the OPEC and the option of using the OCS as a standby production capacity—an oil weapon—to deter price increases and embargos in the future. (T. 1645) (SA 15)

- 4—The PDOD's conclusion that OCS oil would be cheaper than energy from alternative sources completely left out the future. (T. 1646 (SA 16))
- 5—The PDOD failed to discuss the cost to future generations of using up an exhaustible OCS resource now. (T. 1646) (SA 16)
- 6—The PDOD failed to compare the profits that would be secured in the future from holding the oil off the market, with the profits to be secured right now from OCS development (T. 1647, 1648) (SA 17, 18)—a comparison which should have been made by a prudent administrator charged with the administration of a public resource. (T. 1648) (SA 18)
- 7—The PDOD's conclusion that the cost of energy conservation is greater than the cost of producing from the OCS is misleading and wrong (T. 1653) (A. 684) it does not disclose the basis for the Secretary's decision, nor of his evaluation of the energy conservation option and its feasibility. (T. 1653-1656) (A. 684-687)
- 8—The PDOD failed to deal with the future and failed to consider the future costs of energy conservation, and how the economy can adjust over a future period to energy conservation and to a gradual constriction in the supply of energy. (T. 1658-1660) (A. 688-690)
- 9—The PDOD failed to evaluate how energy conservation, combined with development of alternative fuel sources, could reduce the energy deficit to the point where the Secretary might say "it's better to keep this for future reserve than to use it up now."
- 10—The PDOD is based on the erroneous assumption that OPEC doesn't exist, that "we can accelerate

the leasing of oil or we can hold the oil—hold back supplies and it will have no impact on future prices.” (T. 1666) (A. 692)

- 11—The PDOD fails to evaluate the scenario that it’s politically and economically infeasible to be completely self-sufficient (T. 1666, 1667) (A. 692, 693), *that is a scenario of rapid development of the outer continental shelf and rapid production from the OCS may leave the United States still vulnerable to cuts in oil consumption.* (T. 1668, 1669) (A. 694, 695)
- 12—The PDOD failed to evaluate the alternative (presented by Dr. Newlon in the CEQ hearings (P. Ex. 71) of exploring the OCS, developing standby production plans, but with leasing for production contingent on future increases in the real price or a decrease in the security of oil imports. (T. 1670; A. 696; T. 1671; SA 19) Newlon affidavit, P. Ex. 72, pp. 5, 6; (“The Oil Security System: An Import Strategy for Achieving Oil Security and Reducing Oil Prices”) (P. Ex. 69)
- 13—The PDOD gives the illusion of an analysis, and an illusion of a cost-benefit comparison, but does not set forth the actual considerations that entered into the decision making process. (T. 1675) (SA 21)
- 14—A prudent administrator charged with the administration of the public resources of the OCS lands, to the extent that he used the PDOD, as a document upon which his decision was based, would not be justified in making a decision to accelerate OCS leasing and in particular making a decision to hold lease sale 40. (T. 1675, 1676) (SA 21, 22)
- 15—The PDOD is an integral part of the impact statement and the EIS can’t be understood without considering the PDOD (T. 1672) (SA 20). As Newlon

put it:

"I think that in something as important as leasing on the outer continental shelf, where there are security issues, where there are environmental issues, where there are substantial economic issues, that there should be a document that describes the decision making process on which—and justifies the decision that's been reached." (T. 1698, 1699) (SA 23, 24)

16—The Programmatic PDOD does not provide analytical basis for accelerating the OCS, and it really obscures the issues about why the Secretary would or would not consider a certain option. (T. 1701, 1704) (A. 698, 699)

17—If we had reasonable price regulations, a lot of the shortage in natural gas would disappear (T. 1716); and if the price increase didn't bring additional supplies it would bring a reduction in demand that would bring demand in balance with supplies. (T. 1721, 1723) (A. 700, 701)

In sum, Newlon concluded that the PDOD is an inadequate review of the alternatives to accelerated leasing of the OCS because its comparisons are static and not dynamic, it fails to consider the implications of leasing policies for monopoly power, and it neglects the contingent leasing option.

George Donkin also concluded that the PDOD's discussion of the perceived problem of insecure and expensive oil imports was inadequate. He observed that the PDOD discusses possible solutions to the oil import problem within a static or short term context, as opposed to addressing the issue in terms of a secular or long-term perspective. By so doing, the PDOD ignores the problem that *if we accelerate production from the frontier areas of the OCS now, those areas may be depleted later, when needed*

as much or even more. To that extent, accelerated OCS production will make imported oil increasingly "insecure and expensive" over time (P. Ex. 73, p. 70)

Donkin found that the Programmatic PDOD did not consider the option of utilizing the OCS as a form of energy reserve as a safeguard against even more expensive or insecure imported oil in the future, and that the PDOD failed to base the decision to accelerate OCS leasing on a complete assessment of both short term and long term comparisons of OCS production against all of the relevant alternatives. (P. Ex. 73, pp. 71, 72)

Thus, under the assumption that conventional domestic petroleum production from non-OCS lands will, over time, account for an even smaller percentage of our total energy consumption, maximizing OCS production through accelerated OCS leasing may in fact be increasing our ultimate dependence upon imports in the future. (P. Ex. 73, p. 72)

None of defendants-appellants' witnesses refuted this testimony.

POINT VII

The decision documents inadequately evaluate the energy conservation option as an alternative to accelerated OCS leasing and lease sale 40.

Newlon

Dr. Newlon pointed out the PDOD's static and misleading comparison of the cost of accelerated OCS leasing to the cost of energy conservation, and its erroneous conclusion that mandatory conservation was not a desirable alternative. (Ex. 72)

Donkin

Donkin also concluded that the PDOD's comparison was based on a deficient analytic foundation because it erroneously compared \$1-\$7 per barrel costs of OCS oil with

\$11-\$12 price for non-OCS oil, and failed to take into account that the existing \$11-\$12 price of oil is a function of current, as opposed to future, demand levels, which demand would be reduced by effective conservation measures. Therefore the PDOD should have appropriately compared—not OCS production vs. \$11 oil today, but rather OCS production vs. some combination of energy conservation and increased production from non-OCS energy sources. (P. Ex. 73, pp. 67, 68) (Donkin T. 1767, 1768) (A. 702, 703)

Ross

In his affidavit, P. Exs. 78 and 78, Prof. Marc Ross states that fuel conservation is the best energy policy for simultaneously stretching out our limited fossil fuel resources, holding down total energy costs, minimizing dependence on foreign energy sources and protecting the environment. (P. Ex. 78, 1, 2) This estimate of the potential for fuel conservation was greater than the estimates in *Energy Alternatives: A Comparative Analysis* (the reference relied on in the FES-Sale 40) and he concluded that said reference was obsolete and not a useful reference on the subject of the potential for fuel conservation. (P. Ex. 78, 2)

Dubin

The affidavit of Dubin (P. Ex. 77) found that the Program FES and the Sale 40 FES did not make an adequate evaluation of the alternatives of energy conservation and solar energy, and that their potential was far greater than presented—a potential which could be quantified by a meaningful energy conservation study of the scope described in his affidavit. Absent such study, the BLM cannot truly say that it adequately evaluated the alternatives of energy conservation and solar energy.

None of defendants-appellants' witnesses refuted this testimony.

POINT VIII

The decision documents fail to adequately evaluate the alternative of separating exploration and production.

This point illustrates most vividly the Secretary's failure to comply with NEPA, Sec. 4332(2)(C)(iii) and Sec. 4332(2)(D) which require agencies to develop "appropriate" alternatives when there are "unresolved conflicts concerning alternative uses of available resources".

Frequently during the evidentiary hearing, the common sense option of separation made itself explicitly or implicitly manifest as an alternative which would permit oil and gas exploration, environmental data gathering, and coastal zone management planning, and the analytical process incidental thereto, to proceed apace without delay, and under full control by the government of the public OCS resources, and deferring to the end the final massive production step and its concomitant heavy risks, investments and commitment of resources.

The rationale of such separation is that at the end of the data gathering, assessment and planning process, and before irreversible commitments are undertaken, all decision makers and interested parties will have optimized their knowledge of the risks, costs and benefits of accelerated OCS leasing and lease sale 40.

As the Court observed in *Environmental Defense Fund v. Corps (Gillham Dam)*, 325 F. Supp. 728, 762, 1 ELR 20130, 20143 (E.D. Ark. 1970-71)

"If there exists any alternative which would satisfy all of the competing interests—that is, an alternative in which all of our citizens could 'have their cake and eat it too'—this should be made explicit in any 'detailed statement' required by NEPA."

The separation alternative may very well be the "cake" alternative. Yet it is not adequately evaluated in the FES-Sale 40. Its advantages became apparent as the plaintiffs' scientific experts analyzed the deficiencies of the decision documents. The advantages include:

- 1—Time to obtain more complete and better information as to:
 - a—quantity, location and value of oil and gas reserves in frontier areas
 - b—amount of Gulf of Mexico oil and gas production
 - c—other domestic and foreign sources of energy
 - d—future prices of oil and gas and demand and supply responses
 - e—impact of energy conservation
 - f—results of FTC proceedings against major oil companies re anti-competitive practices
 - g—inputs regarding anticipated onshore impacts needed for coastal zone management planning (locations and feasibility of pipelines, refineries and other onshore support facilities, etc.)
 - h—baseline studies and other environmental studies, and to develop predictive capability as to effects of oil on marine environment; acquisition of best available fisheries data from NMFS
 - i—requirements to be incorporated in development or production plans, lease stipulations and termination clauses
- 2—time to study the North Sea experience
- 3—time to develop or improve risk analysis models for offshore and nearshore spills

- 4—opportunity to coordinate lease production plans with CZM and fisheries management planning, and to estimate amount of federal assistance needed
- 5—time to take advantage of improvements in oil spill prevention and clean up technology
- 6—improvements in OCS operating orders
- 7—development of standards for defining unacceptable environmental risks and cost/benefit models for quantifying and balancing economic values of renewable and non-renewable resources
- 8—opportunity to assess optimal deployment of capital for energy development
- 9—opportunity to assess potential for inter-fuel substitution
- 10—opportunity to assess a range of options and alternatives, such as conserving OCS oil and gas as a strategic reserve for future use, retaining it as a standby production capacity, etc.

The list of advantages is legion.

Plaintiff urged that the separation option be evaluated prior to completion of the FES-Sale 40 (P. Ex. 83), but the request was ignored.

The Secretary has the authority to separate exploration and production, if not by issuing separate exploration and production leases, then by either engaging in government exploration or contracting with third persons for such exploration.

Even if he doesn't have the authority to implement separation, NEPA requires that he adequately evaluate such option.

POINT IX

The decision documents failed to evaluate the anti-competitive impact of accelerated OCS leasing and lease sale 40, thereby violating the NEPA requirement that the EIS disclose "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented".

The complaint, paragraph 22 (p. 24) alleges that the FTC has filed a proceeding charging the major oil companies with anti-competitive practices.

The answer (paragraph 22d, p. 5) admits this allegation.

The complaint, paragraph 23 (p. 24) alleges that the FTC proceeding and reports were known to the Secretary and that he made no reasonable effort to determine its relationship to the OCS leasing program.

The answer (paragraph 24, p. 5) admits that the FTC staff report was reviewed by the BLM in preparation of a background analysis for the Department's proposal in early 1974 to ban certain joint-bidding for OCS leases.

In its answer (pp. 26-28) to plaintiffs' interrogatories 15J, N, O, P, S, T, U, V, W, X (pp. 39-42), defendants admitted that no studies were made by or in behalf of or relied on by the Secretary as to the anti-competitive impacts of accelerated OCS leasing.

We stress the importance of these interrogatories and answers as bearing on the Secretary's utter failure to grasp and consider these critical socio-economic effects of accelerated OCS leasing and their implications for assessing the supply/demand factors and need for, alternatives to, and environmental costs of, accelerated OCS leasing.

These matters were within the awareness and cognizance of the Secretary, as evidenced by the partial steps taken

by the Secretary to deal with the problem of joint bidding for OCS leases. However, he failed in his critical responsibility of evaluating somewhere in his decision documents, the anti-competitive impacts of accelerated OCS leasing. That these were perceived to be real is established by the FTC March 1976 letter (P. Ex. 75) sent in response to the Court's order directing distribution of the Program PDOD to the Justice Department and the FTC. The FTC letter found that accelerated OCS leasing would have anti-competitive effect. Yet, as the deposition of Frank Basile shows (pp. 394-396) and as is clear on the face of the FES-Sale 40 and PDOD-Sale 40, no evaluation was made of the FTC staff comments. Nor was any evaluation made of the Rand critique (P. Ex. 84, 99) which dealt with related matters, and was forwarded by special counsel for the County of Suffolk to Interior prior to preparation of the FES-Sale 40, and the PDOD-Sale 40.

It is clear that from the very inception of this case, the Secretary was put on notice via the complaint and interrogatories of the anti-competitive impact issue, but failed to evaluate it as part of the decision making process.

The Secretary's disregard of the FTC comments violated NEPA Sec. 4332(C), and his failure to evaluate the dissenting views brought to his attention before preparation of the Sale 40 decision documents violates the rules laid down in:

Committee for Nuclear Responsibility v. Seaborg,
404 U.S. 917, 3 ERC 1126 (D.C. Cir. 1971), 1
ELR 20534 (1971);

Environmental Defense Fund v. Corps (Gillham Dam), 325 F. Supp. 728, 759, 1 ELR 20130,
20141 (E.D. Ark. 1970-71);

Environmental Defense Fund v. Corps of Engineers, 348 F. Supp. 916, 933, 4 ERC 1408 (N.D. Miss. 1972).

See also *Council on Environmental Quality Guidelines*, 40 C.F.R. Section 1500.10(a) which requires that

"where opposing professional views and responsible opinion have been overlooked in the draft statement and are brought to the agency's attention through the commenting process, the agency should review the environmental effects of the action in light of those views and should make a meaningful reference in the final statement to the existence of any responsible opposing view not adequately discussed in the draft statement, indicating the agency's response to the issues raised."

Following the lifting of the stay on Sale 40, the Secretary, on August 17, 1976, held the lease sale.

The bids received by the Department of the Interior for sale #40 indicate that several major oil companies—Exxon, Mobil Oil, Texaco, Gulf, Shell—were high bidders for a substantial portion of the lease sale acreage (United States Department of the Interior, Bureau of Land Management Report-11) (High Bid Recap By Tract August 19, 1976). These are the same companies who have been charged by the Federal Trade Commission with anti-competitive conduct in the pending proceedings described in the County's complaint, paragraph 22.

The Secretary's failure to assess the anti-competitive impact of accelerated OCS leasing has produced the very result reported by the Federal Trade Commission when it advised the Secretary that accelerated OCS leasing would have an anti-competitive impact. Ownership and control of a significant share of lease sale 40 public oil and gas resources has now been transferred to private vertically integrated major oil companies whose anti-competitive conduct is the subject of FTC proceedings.

NEPA Section 4332(C)(v) requires that an EIS disclose any irreversible and irretrievable commitments of

resources which would be involved in the proposed action should it be implemented.

NEPA Section 4332(2)(D) requires the Secretary to "study, develop and describe appropriate alternatives to recommended courses of action to any proposal which involves unresolved conflicts concerning alternative uses of available resources".

The Secretary's August 17, 1976 lease sale has, without the required prior NEPA assessment of anti-competitive impact and alternatives, resulted in an irreversible and irretrievable commitment of public oil and gas resources to private oil companies. As the leases now stand, they may not be terminated except through condemnation and payment of appropriate compensation to the oil company lessees, or by court ordered rescission.

No argument is advanced by any of the defendants or in the District Court opinion that the Secretary was not under a duty to evaluate the anti-competitive impact of accelerated OCS leasing and lease sale 40. Since the Secretary's leasing decisions caused a primary impact on the physical environment, it became incumbent upon him to adequately assess such socio-economic effects as the anti-competitive impact.

Chelsea Neighborhood Associations v. U.S. Postal Service, 516 F.2d 318, 388 (7 ERC 1957) (2d Cir. 1975);

Hanly v. Mitchell, 460 F.2d 640, 647 (4 ERC 1152) (2d Cir. 1972); cert. denied 409 U.S. 990 (4 ERC 1745) (1972).

POINT X

The FES sale 40 is not an adequate decision making document under NEPA because it does not inform the Secretary of the nature, location and value of the specific Mid-Atlantic fishery resources, and it has no predictive capability of assessing the potential adverse impact of the OCS project on such resources. The Mid-Atlantic baseline study program is similarly defective.

The Court stated in its opinion that the NEPA documents sufficiently apprised the Secretary of the overall environmental dangers and difficulties. The Court said that the Secretary might well have concluded that there was more than sufficient data available in the EIS to make a reliable prediction that negative impact on the biota and environment generally would be negligible and transient (Opinion p. 19, A p. 28) and that the EIS's presented a fairly grim, detailed and encyclopedic picture of possible environmental difficulties. (Opinion p. 31, A p. 40). The Court concluded, therefore, that the EIS's satisfied the requirements of NEPA, Section 4332 (2)(C)(i)(ii).

We respectfully submit this was error because if the Court's interpretation of NEPA is correct, then any agency may satisfy NEPA by using a shotgun approach and simply scattering adverse environmental impact pellets all over the map in exaggerated and gloomy terms and without requiring detailed data as to impacts on specific sites, areas or regions. The agency does not discharge its NEPA duties by providing a "generous ration of environmental, irrelevant 'filler'."

Sierra Club v. Coleman, 405 F. Supp. 53, 8 ERC 1477, 1479 (D.D.C. October 17, 1975).

The EIS's relied upon by the Secretary here are examples of this type of shotgun approach to assessing environmental impact.

Plaintiff's Exhibits 22-46, sponsored by Prof. McHugh, reflect the distribution of the commercially valuable fisheries of the Cape Cod and Cape Hatteras area. If properly managed, the estimated annual catch is a million metric tons with annual gross value of \$1 billion dollars (T. 917, 918; A. 467, 468 erroneously says \$1 million). These fishery resources in the Mid-Atlantic area are in close proximity to any Sale 40 offshore oil operations, and the International Commission for the Northwest Atlantic Fisheries (ICNAF) formulates species quota management recommendations for U.S. and foreign governments with respect to this resource. (McHugh T. 919; A. 469)

In addition, pursuant to the Fishery Conservation & Management Act of 1976, the Mid-Atlantic Fishery Management Council will have the responsibility of drawing management plans for the six states from New York to Virginia (T. 921-922; A. 470-472). The Act will take over management from ICNAF (T. 923; A. 473).

The FES-Sale 40 did not assess the impact of accelerated leasing or of Sale 40 on the management planning which has been undertaken pursuant to the Act. (T. 922; A. 472)

The value of the fisheries charts (P's. Ex. 22-46) to a decision maker is that they demonstrate how widespread these resources are at some stage in their life history, that at some stage of their life history most of them traverse the area where the proposed lease sale might take place, and that they also migrate in all directions with the seasons, so that even if a particular resource is not in the general area of the drilling at one time, it could very well be at another time of the year. (T. 924) (A. 474) The Exhibits demonstrate that there are some extremely valuable resources here that could be affected by accidents that

might take place or by any by-products of the exploration and exploitation process. (T. 924, 925) (A. 474, 475) For example, if there were a blowout during exploration, it's possible some damage might be done to fishery resources in the vicinity. (T. 925) (A. 475)

McHugh testified that the exhibits were prepared with data that were available but were not used in the EIS and that if the decision maker had had this information at his disposal he could have made a wiser decision. (T. 924) (A. 474)

It was not sufficient for the FES to describe in generic terms, however gloomy, the adverse impact of drilling on marine life. Its function under NEPA is to accurately describe the real world of Mid-Atlantic lease sale 40 area fisheries resources, with specificity as to species distribution, magnitude, dollar value and location, so that the decision maker would be informed of the conflicting claims of oil and gas production and fisheries in the OCS. Without such data, intelligent management decisions are impossible.

It is not enough to simply catalogue, with encyclopedic detail, lists of species and to overstate in general terms the adverse effects of oil production on such living organisms. If it were enough, then impact statements would degenerate into long laundry lists of names, accompanied by a gloomy assessment of the adverse impacts of oil and gas drilling. Were this litany repeated often enough, decision makers and the public would be desensitized to the point where the EIS would lose all value. The point is, NEPA is not satisfied by either an understatement or overstatement of adverse impacts. On the contrary, NEPA requires realistic, localized assessments of sufficient particularity to enable decision makers to weigh potential conflicting uses of the OCS for the purpose of making practical management decisions.

In the instant case, it was important for the decision maker to understand and compare the economic value of

the renewable infinite fishery resources depicted on Plaintiff's Exhibits 22-46 with the non-renewable finite oil and gas resources alleged to be located in the Sale 40 area. This information was not provided and the FES-Sale 40 made no attempt to assess, quantify or compare the economic values of the living resources vs. the non-renewable resources of the proposed lease sale area. (T. 926, 974) (A. 476, 511)

It is possible to develop a standard or methodology and procedure which could be used as a basis for making such comparison, and such a standard would be a useful tool for the Secretary for making an informed decision as to whether to lease or not to lease in the proposed lease sale area. (T. 926, 927) (A. 476, 477)

The BLM lacked any written standards for judging when environmental damage would be great enough to justify withdrawal of tracts from leasing. (Basile deposition, 7/6/76, 513, 514) (A. 868, 869) It lacked any written standards for balancing renewable against non-renewable resources. (Basile dep. 7/6/76, 519) (A. 870) In fact, the Department of the Interior has no written standards for judging when not to lease because of unacceptable environmental risks.

Prof. McHugh testified that the basic fault in the FES-Sale 40 was that it is a catalogue rather than a discussion of cause and effect, and that the same defect inhered in the baseline study program embodied in the VIMS contract (P. Ex. 48) which simply proposed to extend the catalogue and to describe in more detail what is there rather than a study of mechanism, processes and cause and effect. (T. 931; A. 479) (T. 932; SA. 4) (T. 933; A. 480)

McHugh testified it was important to examine processes and cause and effect or to undertake a controlled oil spill, because this would give the decision maker additional information that would help him to determine and perhaps even forecast more accurately what the effects of petro-

leum in the natural environment might have on the fishery resources. (T. 933, 934) (A. 480, 481)

In McHugh's opinion, the approach followed by the BLM in its FES and in its baseline study program had no predictive capability or value, and the BLM was not asking all the right questions in the EIS. (T. 934) (A. 481)

Criticisms and concerns over the purpose and scope of BLM's baseline study program were also expressed by the Fish & Wildlife Service, CEQ, Environmental Protection Agency, National Marine Fisheries Service, NOAA, and several coastal states. (R. Hughes deposition, 232-245 (A. 926-939); P's. Exs. 111, 112, 113; Program FES, Vol. 2, 381, 391, 448, 525, 762, 785, 914-916, 946, 948, 955)

In the Program FES, Interior admitted that the baseline studies were not specifically designed to *predict* OCS developmental impact, and were not designed for decision making as to how, when, or if to lease in the OCS, but were designed to identify the *effects* of OCS operations *after* they have taken place, and that in most cases the environmental studies would only be marginally useful in tract selection and would play little, if any, role in area selection. (Program FES, Vol. 2, 398, 406, 465, 466, 595, 606, 733, 773, 774)

Interior also admitted that baseline environmental studies were not specifically designed for data acquisition for input into site-specific environmental impact statements, and that they were designed as pre-drilling surveys which would allow data collected after drilling commences to be compared for changes in environmental conditions. (Program FES, Vol. 2, 962, 1035-1036)

These are astonishing admissions. They prove, first, that the FES-Sale 40 is not intended to predict or assess impact as required by NEPA, and second, that even the baseline studies are not so intended, but are designed rather to monitor the *after* effects of drilling. But, as

Prof. McHugh points out, the baseline study program cannot assess the *after* effects, because it is not designed to study processes and cause effect relationships.

Finally, Prof. McHugh testified that in his opinion the FES-Sale 40 and PDOD-Sale 40 do not enable the Secretary to assess the potential adverse impact of drilling on the fisheries, or to weigh the risks and costs of adverse impact on fisheries resources, and they do not enable the Secretary to objectively balance risks and costs against the asserted benefits of drilling. (T. 949, 950) (A. 486, 487) He further testified that Visual 4 of Vol. 4 of the FES-Sale 40 is deficient as a decision making document because it is almost impossible to extract any precise information from it (T. 951; A. 488; T. 1001; SA 5) (as for example, the fact that Great South Bay supports one of the most important clam fisheries anywhere in the nation). (T. 952) (A. 489)

Thus, neither the FES-Sale 40 or the baseline study program have any predictive value, and neither satisfies NEPA's requirements. We are left simply with a descriptive catalogue which is being expanded by the VIMS contract work.

What is cause for additional dismay is Interior's admission that the baseline study program was not one which would give coastal states the background information and delineation of development impacts so that such states could make full knowledge decisions. (Program FES, Vol. 2, 733)

Since, as we have noted elsewhere in this brief, the FES-Sale 40 does not provide the coastal states with needed inputs, they may look forward to nothing of value from Interior.

The Court questioned Prof. McHugh as to what value additional studies would have to a practical decision maker. (T. 1037-1040) (A. 552-555)

The question implicitly assumes that the Secretary has done as much as can be reasonably expected in the FES and Baseline Study Program.

However this is not the case because *NEPA, Sec. 4332 (2)(A)* requires a diligent research effort, undertaken in good faith, which utilizes effective methods and reflects the current state of the art of the relevant scientific discipline.

Environmental Defense Fund v. Hardin, 325 F. Supp. 1401, 1 ELR 20207 (D.D.C. 1971).

That the Secretary's research and study effort failed to meet the NEPA standard was abundantly documented, not only by the plaintiffs' scientific experts but by Fish & Wildlife Service, EPA, NMFS, NOAA, CEQ and various coastal states.

As *EDF v. Hardin* points out, NEPA envisions that the evolution of projects will be the result of research efforts rather than that research will be utilized to rationalize projects already proposed.

325 F. Supp. at 1404, 1 ELR 20208.

In the case at bar, the FES and baseline study program are being utilized to rationalize the Secretary's prior decisions to accelerate OCS leasing and to hold lease sale 40.

Professor Stephen Moore of MIT further documented the inadequacy of the FES, and the Secretary's failure to meet the NEPA requirements as to data acquisition, treatment and analysis.

Testifying from the perspective of a systems analyst, Professor Moore dealt with five specific aspects of the inadequacy of the FES-Sale 40.

1. The basis used by the Secretary for compiling, synthesizing and evaluating the ecological data base for impact analysis is inadequate. (Moore, T. 1047) (A. 563)

The FES is lacking an explicit framework for determining what data should be included or excluded from the analysis; what framework should be selected for synthesizing the utilized data for the impact analysis. The FES is simply an ad hoc literature review with certain data included and other information not included for no apparent reason and with no assessment of the inadequacy of the data provided. (T. 1049-1055) (A. 565-571)

2. The FES treatment of data and analysis uncertainties is inadequate. (T 1047 A. 563) The FES makes no analysis of the implication of proceeding under the high level of uncertainties in the data and in its analysis. No attempt is made to inform the Secretary what the risk is of going ahead and making a decision to proceed with lease sale 40 when there are major critical areas which are simply unknown. (T 1059) (A. 573)

As an example, although the FES contains no information about long term effects of oil spills, yet it attempts to draw a more certain conclusion than is possible from the data. (T 1060-1061) (A. 574-575) In virtually all the areas of the FES in which conclusions are drawn about effects, there is nothing included in those conclusive statements about the measure of uncertainty, be it qualitative or quantitative, and qualitative conclusions in the FES are not substantiated and documented. (T 1064-1065) (A. 576-577)

3. Professor Moore testified that the methodology for assessing the biological impacts of oil spills is inadequate, and that the methodology used to assess biological impacts does not reflect the existing state of the art. (T 1070; A. 578) There is a lack of any apparent systematic framework for synthesizing the pieces of the analysis into a consistent and comprehensive whole and the lack of specificity and quantification of impacts, when these are possible and methods for doing so exist in the literature. Instead, the

methodology used in the FES essentially consists of a selective literature review and qualitative ad hoc suggestions of how generic biological communities of the Mid-Atlantic might be affected by petroleum releases. (T 1071, 1071a) (A. 579-580)

4. The FES analysis of the occurrence movement and impact of nearshore oil spills (e.g. pipeline spill) is inadequate. (T 1073) (A. 581)

Moore indicated how such an analysis could be made using the fisheries charts (P's. Exs. 22-46) and other maps showing the distribution of habitats along the southern coast of Long Island. (P's. Exh. 49-52) He said it would be possible to get a clearer handle on that if these kinds of resources were mapped and then overlays of spill probabilities and spill trajectories were made. (T 1078; A. 581) (T. 1074-1082; SA 6-14) (T. 1083; A. 582)

5. The FES methodology for summarizing and evaluating overall risks is inadequate. (T. 1084; A. 583) The FES proximity analysis only considers offshore spills and no attempt is made to include spills originating nearshore. As a result, any assessment of environmental risk based on this analysis is incomplete and does not reflect the possible risks which relate to each tract. (T 1084-1087) (A. 583-586)

The FES contains no standards or criteria established by the BLM for determining the environmental acceptability of leasing and development of OCS areas. Without numerical quantitative standards, criteria cannot be laid out as to what is environmentally acceptable, and the decision maker is left up in the air as to how to evaluate and assess impacts. (T 1087-1088, 1110-1113 A. 586-587, 598-601) The FES-Sale 40 is not adequate for the purpose of determining the environmental acceptability of the proposed leasing development. The Secretary is not given the best information available and an assessment of how

well known the estimated impacts are (T 1089 A. 588), although appropriate methodologies exist for quantifying and assessing impacts. (T 1100-1108) (A. 589-597)

POINT XI

The decision documents fail to adequately evaluate the impact of accelerated OCS leasing and of lease sale 40 on coastal zone management planning; if not delayed, lease sale 40 will overwhelm and pervert the CZM planning process; the separation of exploration and production alternative, in relationship to CZM planning, should have been evaluated.

In its opinion the Court raised the issue of whether the Coastal Zone Management Act Amendments of 1976 required the Secretary to defer new OCS leasing to await State compliance with the CZM Act. (Opinion p. 47, A p. 57) The Court concluded that OCS leases need not await approval of formal coastal zone management plans. (Opinion p. 53, A p. 63) The Court, however, failed to reach and decide the issue of whether immediate OCS development of the Sale 40 area in the hands of the petroleum industry would overwhelm and pervert the timing and content of the CZM program of the affected states. The evidence at the hearings establishes that this would happen.

The CZM Statute

Under Section 4 of the CZM Act Amendments of 1976, financial assistance to coastal states is conditioned on their developing CZM programs:

- 1—describing the CZM organizational structure and its interrelationship with regional and interstate agencies in the CZM process (S. 305(b)(6));
- 2—defining the planning process for assessing and managing the impact of energy facilities in the coastal

zone, and for the protection of public beaches and coastal areas. (S. 305(b)(7) & (8))

The latter components of the CZM program are due by October 1, 1978.

Section 5 requires that the CZM program give adequate consideration to the national interest in providing for the siting of energy facilities in the coastal zone, and to any applicable interstate energy plan or program.

Section 6 provides that after the CZM program has been approved by the Secretary, no permit or license for OCS exploration, development or production, which affects such state coastal zone, will be granted without a certification that such OCS activity is consistent with and complies with the state's approved CZM program. (S. 307(3))

Section 7 provides for financial assistance to coastal states and local governments to enable them to plan for the consequences relating to new or expanded energy facilities in the coastal zone (S. 308(a)(1)(B)); to provide new or improved public facilities or public services required as a result of coastal energy activity (S. 308(a)(1)(C)&(D)); and to alleviate unavoidable loss of valuable environmental or recreational resources. (S. 308(a)(1)(F))

The amount of financial assistance to be provided will be related to the volume of oil and natural gas produced from the OCS leased acreage immediately adjacent to such coastal state, or which is landed in such state (S. 308(a)(2)(B)&(C)); and the Secretary will establish a formula for apportioning the financial assistance equitably among the coastal states (S. 308(e)(1)). No coastal state is eligible to receive any financial assistance unless it has an approved management program (S. 308(g)).

Section 8 encourages the coastal states to give high priority to coordinating and unifying state CZM planning policies and programs (S. 309(a)).

Section 9 provides that each federal agency may assist the Secretary by furnishing information to the extent permitted by law, in carrying out the purposes of CZM (S. 310(a)).

The Evidence

Prof. Mitchell's testimony abundantly established that a big OCS lease sale 40 oil strike would generate permanent onshore impacts of a magnitude and with a rapidity which would overwhelm local planning capability (T. 446, 451, 452 A. 297, 299, 300), and that the decision documents did not adequately assess the scale of onshore impacts expected, their effect in the short term, and on communities in the region (T. 454-458 A. 302-306).

He also pointed out that tanker traffic and the attendant oil spill risk may increase, depending on the comparative timing of platform production, pipeline and refinery installations, oil strikes in various frontier and other areas (egs. North Atlantic, South Atlantic, Alaska North Slope), and international oil industry logistics, resulting in impacts not adequately detailed or analyzed in the decision documents (T. 517, 523 A. 358, 364).

Mitchell also testified that the decision documents did not adequately discuss the anticipated cumulative impacts of Mid-Atlantic, North Atlantic and South Atlantic lease sales. (T 563) (A. 395)

Drawing upon the experience of Scotland, where offshore oil development ground local planning system to a halt, he concluded that if sale 40 occurred as scheduled, the coastal states and communities would not have sufficient information from the decision documents with which to plan intelligently for coastal zone management. (T 572, 573) (A. 404, 405)

It is clear from Mitchell's testimony that the decision documents do not provide the information needed by the coastal states for carrying out their responsibilities under

the CZM Amendments of 1976. Without detailed information of the type which Mitchell found lacking, the coastal states cannot determine the type of CZM organizational structures needed. They cannot define and establish a planning process for assessing and managing the impact of energy facilities in the coastal zone, and for the protection of public beaches and coastal areas (due by October 1, 1978). Nor do they have enough information with which to grasp and give adequate consideration to the "national interest". Indeed, on the basis of the decision documents, nobody can determine what is the "national interest", because the Program FES and PDOD (September 1975) lack a clearly defined accelerating leasing program. (See GAO 3/19/75 Report, Ex. 117)

The Program decision documents speak in terms of a "6 sales per year" proposal involving an indeterminate quantity of acreage. They fail to indicate how much OCS acreage is anticipated to be offered for lease or leased under the accelerated OCS leasing program. Without such information, it is not possible to establish the volume of oil and natural gas to be produced from the OCS, and hence it is impossible to assess the onshore impacts to be anticipated in the Mid-Atlantic and other frontier regions. The absence of such data not only prevents the coastal states from discerning the "national interest", but also precludes them from coordinating and unifying their CZM planning policies and programs and engaging in meaningful regional and interstate cooperation.

The absence of such data also prejudices the ability of the federal government to determine the amount of financial assistance (related to volumes of oil and natural gas produced and landed), to be granted to coastal states, and to equitably apportion such assistance among the coastal states.

Finally, the indefiniteness of the decision documents defeats the consistency requirement expressed in Section 6 of the CZM Amendments of 1976.

As earlier noted, the decision documents do not give the coastal states the inputs they need with which to develop sensible CZM programs. Also, the massiveness and irrevocable pace of offshore development occasioned by the unitary leasing system (which gives the oil company lessee control over both exploration and production) will overwhelm and pervert the CZM planning process. The end result is to impair the viability of any CZM plan and to defeat the Congressional purpose of insuring that offshore development is consistent with an approved CZM plan.

In short, CZM planning has been turned upside down by the lease sale 40 which occurred on August 17, 1976. Instead of the CZM Act controlling the timing and easing the impacts of OCS development, the opposite will pertain—OCS development of the sale 40 area, in the hands of the petroleum industry, will overwhelm and pervert the timing and content of the CZM programs of the affected states—a result contrary to the intent of Congress.

Separation of Exploration and Production

As shown in its broader context, a preferred way of realizing the Congressional purpose on which the CZM Act is based is to separate exploration from production. (Mitchell T. 570, 571) (A. 402, 403) The pause between exploration and production and the retention of governmental control over the OCS resource until development and production plans are ready, will generate better information as to the magnitude and location of oil and natural gas in the OCS, and estimated production, and can be used to provide the coastal states with the inputs they need to assess onshore impacts and to formulate and obtain approval of CZM programs. It will also enable the Secretary of the Interior to require, as a production lease stipulation, that the lessee comply with an approved CZM program prior to beginning production. The period between exploration and production can also provide time for coordination and unification of various state CZM programs,

and interstate and regional cooperation. It will also give the states and federal government a better idea as to the amount of financial assistance needed to deal with expected onshore impacts, and thereby insure against too much or too little financial assistance.

The decision documents failed utterly to evaluate the feasibility of the option of separation of exploration and production, in the context of providing a means for reconciling and coordinating OCS activities with CZM planning.

POINT XII

The Secretary's failure to circulate the programmatic PDOD and the sale 40 PDOD was a violation of NEPA, Section 4332(2)(C).

The Programmatic PDOD and Sale 40 PDOD are "Detailed Statements" within the meaning of NEPA Section 4332 and together with the Program FES and Sale 40 FES comprise the decision documents relied on by the Secretary.

The PDOD's contain economic and technical data relevant to environmental impact, alternatives, and commitments of resources matters required to be disclosed in the NEPA "detailed statement".

The cases establish that the environmental impact statement must:

1. Gather in one place, discuss and weigh those matters such as economics, foreign relations and national security, which are necessary to a consideration of the pertinent alternatives, and the relative environmental impact of alternatives. (*Natural Resources Defense Council v. Morton*, 458 F.2d 827, 3 ERC 1558, 1560, 1561 (C.A.D.C., 1972);
2. Provide a basis for (a) evaluation of the benefits of the proposed project in light of its environmental

risks, (b) comparison of the *net balance for the proposed project* with the environmental risks presented by alternative courses of action (emphasis added) (*NRDC v. Morton*, id. at pp. 1558, 1561);

3. Set forth a finely tuned and systematic balancing analysis of those environmental amenities, economic and technical considerations, costs and benefits, which are in conflict with each other (*Calvert Cliffs v. AEC*, 449 F.2d 1109 (2 ERC 1779, 1781) (1971), observing the Standard that environmental factors are to be accorded peer status with dollars and technology in the agency's decision making. (*EDF v. Corps of Engineers (Tombigbee)*, 492 F. 2d 1123) (6 ERC 1513, 1519) (CA. 5, 1974); and
4. Strike a balance of costs and benefits which is not arbitrary or which does not clearly give insufficient weight to environmental values (*EDF v. Froehlke*, 473 F.2d 346, 4 ERC 1829, 1833); (8th Cir. 1972).

In the case at hand, the Interior Department restricted the scope of the Final Environmental Program Statement (FES) and of FES-Sale 40 by deliberately excluding therefrom, and relegating to the PDOD's important data required to be discussed, considered and weighed in the FES's—namely the economic evidence, criteria and options relevant to the issues of need, alternatives and justified resource commitments—all raised by the proposed Outer Continental Shelf (OCS) accelerated leasing program and by proposed lease sale 40.

This was precisely the type of economic data which *NRDC v. Morton*, 458 F.2d 827, 3 ERC 1558 (C.A. D.C. 1972) held should have been considered in the Interior Department's environmental impact statement for offshore oil and gas leasing. There the Court ruled that NEPA requires that the Interior Department's impact statement

on environmental effects of offshore oil leases contain a discussion of reasonable alternative courses of action even though the Department lacks power to adopt or put such alternatives into effect.

The Court observed that the alternatives not discussed involved economic considerations and included meeting energy demands by federal legislation or administrative action freeing current onshore and state-controlled offshore production from state market demand prorationing or a change in the Federal Power Commission's natural gas pricing policies, and the elimination of oil import quotas. (id. 1560, 1561)

The Court said:

"While the consideration of pertinent alternatives requires a *weighing of numerous matters, such as economics, foreign relations, national security*, the fact remains that, as to the ingredient of possible adverse impact, it is the essence and thrust of NEPA that *the pertinent Statement serve to gather in one place a discussion of the relative environmental impact of alternatives.*" (id. at 1561) (emphasis added)

The Court clearly recognized that environmental and economic factors are linked and that the environmental impact and alternatives to near and long term solutions to the energy supply problem require continuing review, in light of changes in technology or in the variables of energy requirements and supply. (*NRDC v. Morton*, 3 ERC 1558, 1563).

FES-Sale 40, V. 3, page 41, states:

"To engage in formal economic cost/benefit analysis in the EIS itself would tend to obscure environmental analysis by transforming the statement into an overall decision making document centered around economic considerations and having a program justification

focus. A separate overall decision making document, a *PDOD* is prepared to provide the Secretary of the Interior with all aspects to be considered concerning this proposed lease sale."

This is a clear admission that the *PDOD* is not just a summary document (Vol. 3, p. 75), but that the *PDOD*-Sale 40 and the *FES*-Sale 40 together comprise the decision documents relied on by the Secretary as the basis of his decision to hold lease sale 40. It is also evidence that the Secretary skewed the NEPA process into separate documents and relegated the NEPA required cost/benefit analysis and balancing judgment to the *PDOD*.

Furthermore the *FES* statement that it is not intended to have a program justification focus (Vol. 3, p. 41) is itself contradicted by the many statements elsewhere in the *FES* which purport to justify OCS lease sale 40 as

- 1—replacing importation of foreign oil by tankers (Vol. 2, p. 30), (Vol. 3, pp. 18, 29);
- 2—decreasing imports of oil and thereby improving the balance of payments (Vol. 2, p. 241);
- 3—reducing reliance on foreign imports (Vol. 2, pp. 539, 562, 582, 583);
- 4—avoiding dependence on insecure foreign oil imports. (Vol. 2, pp. 564, 578)

The *FES*-Sale 40 also contains statements indicating its tie-in with the Programmatic *FES*. (See for example *FES*-Vol. 3, pp. 59, 63)

Thus it is clear that the Programmatic and Sale 40 *PDOD*'s are "Detailed Statements" within the meaning of NEPA which, together with the Program *FES* and Sale 40 *FES* comprise the decision documents relied upon by the Secretary. Having established this point, we will now show that the Secretary's failure to circulate the Programmatic *PDOD* and the sale 40 *PDOD* was a violation of NEPA.

NEPA, Section 4332(2)(C) requires that a copy of the detailed statement of disclosure and the comments and views of the appropriate Federal, State and local agencies,

"shall be made available to the President, the Council on Environmental Quality and to the public as provided in Section 552 of Title 5, United States Code, and shall accompany the proposal through the existing agency review processes."

However, the PDOD's were not circulated through the NEPA review process despite the fact that they discuss key policy options and managerial issues related to an expanded OCS leasing program and individual lease sales, and contain many issues that must be considered in the overall balancing of environmental costs and economic benefits that will go into the Secretary's decision making regarding offshore leasing. (Program FES, Vol. 2, p. 397, FES-Sale 40, Vol. 3, p. 41)

The Secretary's failure to circulate the PDOD's in the manner required by NEPA foreclosed the possibility of any comment regarding the economic evidence, criteria and options relied on by the Secretary and relevant to the issues of need, alternatives and justified resource commitments—all raised by the proposed OCS accelerated leasing and by proposed lease sale 40.

In the Program FES, the Department of the Interior stated that it would prepare and distribute the PDOD for public comments (Program FES, V. 2, p. 397) and that no decisions will be made on whether to circulate or to what degree to accelerate leasing until the public and the Department have reviewed the final EIS, and that the public will be permitted to comment on the final EIS as well as the PDOD that is being prepared. (FES, V. 2, p. 1033)

In September of 1975, the month in which the PDOD was prepared, the Secretary reneged on his promise. On September 26, 1975, he announced that the Department

would not make the PDOD available for comment by the public. (Fed. Reg., Vol. 40, No. 188, 9/26/75, p. 44344

On January 22, 1976, appellees moved in the District Court for an order directing that the PDOD be circulated and processed in the manner required by NEPA, S. 4332, and in addition distributed to the Department of Justice and the Federal Trade Commission with a request for comments from such agencies concerning possible anti-competitive practices of the major oil companies regarding OCS leasing and other anti-trust issues relevant to OCS production, distribution and marketing, etc. and enjoining the Secretary from conducting the public hearings scheduled on the Draft Environmental Statement for proposed Sale 40, pending completion of the NEPA review process concerning the Program PDOD.

While the District Court, on January 22, 1976, denied the request for injunction, it did direct that copies of the PDOD be made available to the public at the hearing and that copies be distributed to the Justice Department and FTC.

As pointed out in the County's main brief (pp. 40-42) the FTC Staff, in March 1976, (P's. Ex. 75) found that accelerated OCS leasing would have an anti-competitive effect. The Secretary disregarded and failed to evaluate the FTC comments in the Final Environmental Statement for sale 40.

Although the District Court declined to require the circulation of the PDOD as a NEPA document for purposes of enjoining the public hearings scheduled on the Draft Environmental Statement for Sale 40, the subsequent development of a full evidentiary record at the hearings on the motion for preliminary injunction concerning the status and use of the PDOD's as basic decision making documents relied upon by the Secretary, warrants their treatment as NEPA documents, subject to the review and comment process of the National Environmental Policy Act.

Because the Secretary did not process the PDOD's as NEPA documents, the public and other decision makers were precluded from ascertaining and commenting on deficiencies in the PDOD's and the inconsistencies and contradictions, for example, between the Programmatic PDOD and the Program Final Environmental Statement. If one compares the Programmatic PDOD with the Program FES, it is reasonable to conclude that the Secretary may have been misinformed by such deficiencies and contradictions. Examples follow—

There are a number of NEPA issues which are discussed in the PDOD which were not dealt with in the same way in the FES. At pages 2 through 6 of the PDOD, there is a discussion of oil imports. Economic data is given regarding rates of production of petroleum, petroleum consumption, and the increase in oil imports. Estimates are given regarding the costs of the Arab oil embargo and the rise in oil prices. A number of questions arise from this data which, if this information had been included in the FES, might have provoked agency and public comment. For example—What was the role of the major oil companies in controlling the rate of petroleum production? Why did it peak in 1972? Why did production decline in 1974? Why did petroleum consumption increase? Why did imports rise during the period 1972 through 1974? What is the extent of U.S. vulnerability to interruptions in imported petroleum supplies? Are the FEA estimates regarding embargo costs valid? What was the responsibility, if any, of the major oil companies in the rise of world oil prices? Is the Department's central theme that accelerated OCS production will reduce dependence on foreign oil imports valid? What are the dollar costs of oil produced from OCS as compared to the dollar costs of imported oil? To what extent, if any, are the major oil companies responsible for the differential?

In contrast, the FES contains a very limited superficial discussion of oil imports (see for example FES, V. 2, pp.

285, 302), excluding much of the economic data contained in the PDOD. Thus the failure to circulate the PDOD as part of the NEPA review process prevented an opportunity for the public and agencies and organizations with special expertise from commenting thereon and raising pertinent questions, or challenging the conclusions of the Department.

POINT XIII

The "Final" Program EIS was essentially a new draft program EIS; the Secretary's failure to circulate this document through the NEPA review process was a violation of NEPA, Section 4332(2) (C).

The Program Draft EIS described an accelerated 10 million acre proposal. The Final Program EIS described an entirely different proposal calling for 6 sales per year of an indeterminate quantity of OCS acreage. Thus the so-called "Final" Program EIS was not really Final, but was essentially a new draft statement. Since it was never submitted for comment and review by any other federal agencies and since the comments and views of the appropriate Federal, State and local agencies were never solicited with regard to the 6 sales per year proposal, the Secretary failed to comply with NEPA, Sec. 4332(2)(C).

The Secretary was not entitled to treat the uncirculated, unreviewed "Final" Program EIS as a supplemental EIS curative of the defects in the original Program Draft EIS, because circulation and the opportunity for comment had not been afforded.

Natural Resources Defense Council v. Morton, 337 F. Supp. 170, 172-173, 3 ERC 1623 (D.D.C. 1972);
I-291 Why? Association v. Burns, 372 F. Supp. 223; aff'd. 517 F.2d 1077; 6 ERC 1275, 1301, 1302, D. Conn. (Feb. 7, 1974) aff'd. 7 ERC 2147 (2d Cir.) May 30, 1975.

As stated by the court in *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79 (8 ERC 1273) (2d Cir. 1975),

"the use of supplemental data and statements is permissible to bolster an otherwise deficient EIS or to amend an EIS to consider changes in the proposed federal action when the 'supplemental' adequately remedies the deficiency or analyses the impact of the proposed change and is properly circulated among the appropriate agencies before a final decision has been reached." (Id. at 91-92)

"Although an EIS may be supplemented, the critical agency decision must, of course, be made after the supplement has been circulated, considered and discussed in the light of the alternatives, not before. Otherwise the process becomes a useless ritual, defeating the purpose of NEPA, and rather making a mockery of it." (Id. at 92)

POINT XIV

The historical evidence strongly indicates that the NEPA review process was used as post hoc justification for the decisions previously made by the Secretary to accelerate OCS leasing and to hold lease sale 40.

As previously shown, the courts have made it clear that the decisionmaker should not select and discuss only those alternatives which justify a decision previously made.

City of Boston v. Volpe, supra;

Keith v. Volpe, supra;

Jones v. D.C. Redevelopment Land Agency, supra.

Yet this is precisely what the Secretary did in this case. From the very outset, it was clear that the Secretary was

using the NEPA review process as post hoc justification for the decisions previously made (1) to accelerate OCS leasing, and (2) to hold lease sale 40. Thus, it was a foregone conclusion that the Secretary would fail to adequately evaluate the impact, need and alternatives issues previously described in this brief.

The first decision was ostensibly reached on September 29, 1975 and the second on June 26, 1976. The government claims that in each instance the decision was rendered after completion of the NEPA process, and after compliance with its requirements.

However, the historical record, developed through discovery, indicates the contrary—that written internal memoranda and the unguarded slip of the tongue statements of Interior Department officials prove that firm decisions to accelerate OCS leasing and to hold lease sale 40 were made long before the ostensible decision dates, and before fulfillment of NEPA's requirements, and that, in fact, the BLM simply went through the NEPA motions in order to validate the decisions previously made. Each piece of evidence forms part of a decisive mosaic of proof. The limits placed on discovery prevented a fuller development of the White House connection. The White House's keen interest in the accelerated OCS leasing was made clear during repeated telephone conversations between R. Hughes and an agent of the President's Domestic Council (R. Hughes 302-303) (A. 942-943); in discussions with the President and Secretary (R. Hughes 82) (A. 906) and in telephone communications with the President and White House officials (Frizzell 97, 101, 106) (A. 880, 881, 882). The cumulative impact of the evidence unmistakably conveys the sense of events controlled by the prior decisional signals rushing along a predetermined track to accelerated OCS leasing and the holding of lease sale 40.

It is obvious from the historical record that the decisions to accelerate OCS leasing and to hold lease sale 40 were

never in doubt despite NEPA's mandate that the Secretary consider whether or not

- 1) to accelerate OCS leasing;
- 2) to hold lease sale 40.

What was slightly in doubt was when and not whether the decisions to accelerate leasing and to hold lease sale 40 would take place. In fact, there wasn't even much doubt as to when lease sale 40 would take place.

The Court may take judicial notice that the BLM's so-called tentative OCS lease schedules or planning dates have variously shown lease sale 40 as taking place in December 1975 and May 1976—amazingly close to its ultimate scheduled date of August 17, 1976.

Viewed in the context of the historical evidence, to which this brief now turns, the phrases "tentative lease schedule" and "planning dates", reveal their true purpose as aesopian or code phrases instructing all subordinates as to the OCS leasing timetables. The prior decisions of Interior's top decision makers and the tight OCS leasing schedules and deadlines they established caused the haste and pressure under which the decision documents were prepared, and account in part for their poor quality.

If, as the evidence demonstrates, the decisions were already made, prior to completion of the NEPA review process, and if the outcome of the NEPA review process was never intended to revoke or alter the decisions previously made, then the issue of whether the content of the decision documents complied with NEPA's requirements need not be reached, and the Court may, on the basis of the historical record, remand these proceedings to the Secretary with directions that he reconsider his actions in full good faith compliance with NEPA.

The Decision to Accelerate OCS Leasing

At least two internal memoranda prove that this decision was made before the Secretary issued the October 1974 Program Draft Environmental Statement.

In his February 11, 1974 memorandum (P. Ex. 122), Royston Hughes, the OCS Program Coordinator, stated that the decision (to accelerate OCS leasing) had already been made.

This evidence was later reinforced by the September 18, 1974 memo of Under Secretary Jared Carter (Ex. 89) who made it clear that he wanted a *firm* leasing schedule of 10 million acres leased, not just offered. (BLM's N.Y. office manager Frank Basile knew of this memo—Basile deposition 382-390) (A. 851-859).

The fact that both Hughes and Carter were referring to the so-called 10 million acre proposal, which was later changed in November 1974 to the "6 sale per year proposal", does not gainsay the fact that a decision to accelerate OCS leasing was made prior to undertaking the NEPA review process. What changed in November 1974 was not the decision to accelerate, but simply a shift from 10 million acres to an unspecified indeterminate quantity of acreage under the "6 sales per year" proposal.

There was also never any doubt that lease sale 40 was intended to be one of the 6 sales, irrespective of the outcome of any NEPA review. For example, well before the beginning in August 1975 of the preparation of the Programmatic PDOD (R. Hughes deposition, p. 54 (A. 904); pp. 55, 56 (SA 1, 2); p. 56a (A. 905)) and before the July 1975 Final Program Environmental Statement, Requests for Proposals were issued in March 1975 for Mid-Atlantic baseline studies (P. Ex. 48), and in June 1975, the BLM entered into a contract (P. Ex. 55) employing Virginia Institute of Marine Sciences (VIMS) to perform the Mid-Atlantic lease sale 40 baseline study. It is highly unlikely

BLM would have contracted to spend over \$1 million for Mid-Atlantic Baseline studies for lease sale 40, before the issuance of the Final Program Statement, and before September 29, 1975 (the ostensible date of the decision to accelerate OCS leasing), were it not certain that the decisions to accelerate OCS leasing and to hold lease sale 40 were foregone conclusions.

The depositions of Frank Basile, manager of the BLM—N.Y. office, provide additional evidence of urgent preparation for a mid-August 1976 lease sale 40, well before the completion of the NEPA review process and the issuance of the FES-Sale 40, on May 26, 1976, and long before the Secretary's "decision" on June 26, 1976 to hold lease sale 40.

In May 1976, the N.Y. office of BLM received a "planning schedule" for proposed OCS lease sale 40, and a proposed notice of sale with instructions that "the above dates represent the latest time each component must be complete if galleys are to be read and corrected and the August 24, 1976 sale date is to be met." (Basile 373-374; A. 849-850)

On May 3, 1976, Basile and his staff discussed holding a mock lease sale on June 14, 1976, noting that if everything goes well, Sale 40 should take place in mid-August. (Basile 354) (A. 838)

On May 17, 1976, Basile and his staff discussed preparation of a draft notice of sale (Basile 362; A. 839) (363; SA 3), and before June 1, 1976, a draft notice of sale was prepared and sent to Washington, D.C. (Basile 370-372 A. 845-848) (P. Ex. 121). This was contrary to the normal practice of the Department of the Interior not to prepare a notice of sale until the Secretary decided to proceed with such sale. (R. Hughes deposition 261-262) (A. 940-941).

On June 7, 1976, an employee of BLM's New York office requested space be reserved for a sale during the period August 16-18, 1976. (Basile 365-370) (A. 840-845)

Although June 26, 1976 was the earliest legal date (30 days following issuance on May 26, 1976 of the FES Sale 40) at which the Secretary could decide to hold lease sale 40—Secretary Kleppe, on June 16, 1976, announced his decision to hold lease sale 40 on August 17, 1976. (Wall St. Journal Reporter Karen House's deposition, P. Ex. 85)

The Department's embarrassed attempt to explain away the Secretary's announcement as being conditioned on completion of the NEPA review process—deserves little credibility.

On June 18, 1976, a memorandum from Assistant Secretary Richard Hite (P. Ex. 120) stated that the decision had already been made, thus confirming Secretary Kleppe's earlier announcement to that effect on June 16, 1976.

The historical evidence proves that the decision documents, despite their bulk, were intended to rubber stamp decisions previously made, and not to aid in an informed decision making process. Whether the President was exercising leadership in his energy messages on the subject of OCS leasing, or whether the Department of the Interior has a built-in pro-OCS bias, is not the point here. Presidential leadership and agency mission bias are to be expected if programs are to be conceived and planned. But what we have here is much more than that. The record reveals deliberate, calculated decisions to accelerate OCS leasing and to hold lease sale 40, before compliance with the requirements of NEPA. Although the decisions were masked by words like "tentative schedules" and "planning dates", their reality was revealed by the events which followed, as clearly as a railroad schedule publishing the train's arrival times at the stations along the track.

If the Secretary's decision documents are evaluated in their historical setting, it becomes crystal clear that the Secretary never had any intent to seriously and thoroughly evaluate alternatives to his proposed actions such as are described in Points IV, V, VI, VII and VIII. It is also

clear from the historical evidence that the Secretary deliberately ignored the anti-competitive impact of accelerated OCS leasing, which was specifically and forcefully brought to his attention by the plaintiffs and by the Federal Trade Commission. This is not surprising, considering the evidence that the Secretary had made up his mind to accelerate OCS leasing and to hold lease sale 40 long before the completion of the NEPA review process, and was using the NEPA process as post-hoc justification.

The District Court acknowledged that a strong argument had been made, supported by considerable circumstantial evidence, that all the EIS's and public hearings were but a charade, and that the decision to lease was a foregone conclusion. (Opinion, p. 32) (A. 41) The Court stated, however, that it was not convinced that the Secretary and his subordinates did not attempt to execute NEPA honestly and that the documentary and other evidence failed to convince the Court that the Secretary was lying in his categorical denial that he made a decision prior to completion of the entire NEPA statement. (pp. 33, 34)

The District Court refused to allow plaintiffs to take the depositions of former Secretary Morton and present Secretary Kleppe, perhaps because of the exigencies of completing the evidentiary hearings in time for the Court to render a decision before the August 17, 1976 sale. In all probability, given the already strong circumstantial evidence that the decisions to accelerate OCS leasing and to hold lease sale 40 had already been made, it is likely that additional and fuller discovery would have yielded conclusive evidence that such decisions had already been made. If further proceedings take place in the District Court incident to a plenary trial in this action, such additional discovery will be requested.

Nevertheless, on the basis of the evidentiary record before it, we believe the District Court erred in not finding that the NEPA review process was used as post hoc jus-

tification for leasing decisions previously made. In any event, the historical evidence does establish that the Secretary made a biased selection and discussion of only those alternatives which would justify his leasing decisions and failed to identify and adequately assess alternatives such as those described in Points IV, V, VI, VII and VIII of this brief.

POINT XV

Equitable relief is appropriate.

The District Court correctly ruled that injunctive relief was appropriate and enjoined the sale set for August 17, 1976. (Opinion 73-79; A. 33-89)

On August 16, 1976, after hearing oral argument, a panel of this Court stayed the District Court's preliminary injunction order and permitted the sale to proceed on August 17, 1976.

During oral argument, this Court observed in colloquy that it had the power to rescind Sale 40 should it ultimately uphold the District Court and determine that such equitable relief should be provided.

There are good reasons for this Court to exercise its power to direct rescission of the August 17, 1976 sale and to enjoin any further efforts to implement lease sale 40.

The District Court was correct in its finding of NEPA violation on the grounds stated in its opinion and for the additional reasons presented by appellees.

If the sale is not rescinded, and if further steps in implementation thereof are not enjoined, the Secretary will not evaluate the alternatives described by appellees. This will foreclose any consideration of alternatives which may be preferable in the public interest, such as:

- 1) increased oil and gas production from the Gulf of Mexico and other non-OCS energy supply sources; (Point IV and V)

- 2) retention of the lease sale 40 tracts as a strategic reserve for future use, with the objective of avoiding future vulnerability to foreign embargo; (Points IV and VI)
- 3) reliance on energy conservation and other means of reducing energy demand so as to obviate the need for lease sale 40; (Point VII)
- 4) separation of exploration and production with the resultant advantages described in Points IV and VIII).

Furthermore, unless sale 40 is rescinded, it will become a fait accompli, foreclosing the Secretary from performing his NEPA duty to evaluate its potential anti-competitive impact, and to consider the options of withdrawing, reducing the size of, or modifying the bidding procedures or terms of such sale in order to prevent anti-competitive consequences.

Unless sale 40 is cancelled, the Secretary will be foreclosed from incorporating into all leases arising out of this sale, appropriate provisions taking into account requirements or conditions which may be shown to be necessary or advisable by the pending FTC proceedings against the major oil companies, thus resulting in increased major oil company control of the nation's oil and gas resources, slow down of production in other OCS areas, and continued speculative withholding of production under shut-in leases and non-producing reservoirs.

In short, unless Sale 40 is rescinded, it will inevitably involve an "irreversible and irretrievable commitment" within the meaning of NEPA Section 4332(2)(C)(v) of public oil and gas resources to the control of private oil company lessees whose lease rights may not be terminated without huge compensation in condemnation proceedings.

Finally, if sale 40 is not rescinded pending the Secretary's full compliance with NEPA, an irreversible mo-

mentum towards full OCS development will build up. Additional massive investments and commitment of resources will be made in furtherance of said sale. They will involve exploration and the construction of offshore and on-shore support and other related OCS facilities.

The environmental and socio-economic impacts associated with such additional efforts will be heavy and the chain of events flowing inevitably from the sale will be virtually unstoppable.

Some secondary or indirect impacts may be outside the reach of NEPA, and as to those impacts which are subject to NEPA, the preparation of an adequate EIS at this later point in time would be a hollow exercise.

Thus the sale itself, in the face of a violation of NEPA, constitutes immediate irreparable injury warranting equitable relief.

Rescission of the sale will be in the public interest. As the Donkin testimony clearly proved, the alleged gas shortage would be sooner relieved if capital were invested to increase production from the Gulf of Mexico, than if invested in chancy OCS sale 40, and the value of 1 trillion cubic feet of natural gas coming in soon from the sources described by Donkin would be at least \$1.5 billion dollars at today's prices.

Since plaintiffs-appellees have shown the Secretary's violation of NEPA, they are entitled to a preliminary injunction and, although it is not necessary that the Court inquire into the traditional requirements for equitable relief, there are other compelling reasons that the injunction should issue.

"First, this Court is concerned with the analytical harm to NEPA. The Congressional policy underlying that statute is that agencies which propose major federal action consider the national environmental and

societal interest. Since NEPA has been violated, this Court cannot allow the proposed . . . (project) to proceed until the agency properly determines the reasonable alternatives and thus where the national interest lies."

Atchison, Topeka & Santa Fe v. Callaway, 382 F. Supp. 610, 620-622, 7 ERC 1016, 1024 (D.D.C. 1974);

See also: *Sierra Club v. Coleman*, 405 F. Supp. 53, 8 ERC 1477, D.D.C. (1975);

Jones v. D.C. Redevelopment Land Agency, 499 F.2d 502, 6 ERC 1534, 1539, D.C. Cir. April 26, 1974.

Furthermore, based on the evidentiary record, the appellees have not only made a clear showing of probable success on the merits, but have also demonstrated possible irreparable injury, and that unless they immediately receive the relief they are entitled to, there is danger that it will be of little or no value to them or anyone else when finally obtained.

Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973);

Latham v. Volpe, 455 F.2d 1111, 1117 (3 ERC 1362) (9th Cir. 1971);

Chelsea Neighborhood Associations v. U.S. Postal Service (7 ERC 1707, 1716), S.D. N.Y. (1975);

Keith v. Volpe, 352 F. Supp. 1324, 1359 (4 ERC 1350) (C.D. Cal. 1972), aff'd. 506 F.2d 696 (6 ERC 1097) (9th Cir. 1974), cert. denied 420 U.S. 908 (1975);

See also—Anderson—NEPA IN THE COURTS (Environmental Law Institute) (pp. 239-245).

Conclusion

WHEREFORE it is respectfully requested that lease sale 40 be rescinded, and the decision of the District Court affirmed.

Dated: Babylon, New York
September 23, 1976.

Respectfully submitted,

COUNTY OF SUFFOLK

Irving Like
Special Counsel
200 West Main Street
Babylon, New York 11702

SUPPLEMENTAL APPENDIX

HUGHES

1 of recognition?

2 A Yes. Gaskins was the first Director of the Office
3 of OCS Coordination.

4 Q Was he connected with that Office at the same time
5 that you were?

6 A Yes, until he left the Department in the summer of
7 1975, as I recall.

8 Q Did he play any role in the preparation of the PDOD,
9 or did he supply any input with regard to the PDOD?

10 A I believe he did play a role and supplied input.
11 The reason I am somewhat hesitant to state that categorically
12 is that he left either early or mid-summer, but I am sure he
13 had some involvement in the early stages.

14 Q What, if you recall, was the nature of the inputs
15 that were provided by Mr. Gaskins?

16 A Mr. Gaskins is a Ph.D. economist and was Director of
17 the Office and would have been the architect in the earliest
18 stages of any analytical discussions on some of the issues in-
19 volved in the PDOD.

20 Q Now, we have now acquired an additional name of
21 someone who contributed inputs -- an additional in the sense
22 that besides your staff you got inputs from Gaskins. Are
23 there any other individuals who contributed inputs?

1 A Mr. Gaskins was on my staff, if in fact he contri-
2 buted. I qualified his contribution by saying I can't recall
3 when he left.

4 Q Well, of your members who participated; Carlita
5 Kallaur, William Moffet, Lew Puglieri and Peter Jaraway have
6 been mentioned; now have you refreshed your recollection to
7 include Mr. Gaskin as another member of your staff who supplied
8 inputs?

9 A Yes.

10 Q Are there any additional?

11 A Not that I can recall.

12 Q On August 1st, 1975, what was your position vis-a-vis
13 the Office of OCS Program Coordination?

14 A I was its immediate superior.

15 Q And who was the Director of the Office at that
16 time?

17 A Subject to determining the exact date of Mr. Gaskins'
18 departure, to the best of my recollection Mr. William Moffet
19 was the Acting Director of that Office. At the same time, he
20 held the dual capacity as Director of the Office of Policy
21 Analysis.

22 Q Do you recall on or about August 1st, 1975 receiving
23 from somebody in the Director of OCS Program Coordination the

1 way to standardize this stipulation, and input is
2 expected from all the OCS offices. The draft sale
3 notice should be ready by June 1st, and the final
4 should be published in the Federal Register in the
5 second week of July, which is the latest date for
6 making changes in the stipulation for cultural
7 resources. If there is no agreement with them by the
8 second week in June, we should go back to the other
9 OCS offices for further revision and it will then be
10 incorporated in the EIS for Sale No. 42.

11 "Barabara told the group that she is preparing
12 a press release for the final environmental impact
13 statement and would welcome any comment on it this
14 week. A copy of the draft will be sent to Frank
15 Edwards for his approval and the final version will be
16 sent to a different set of people than those who are
17 sent notices by the Washington office.

18 "In response to a question exactly as to what
19 type of material will be sent out to the mailing list
20 maintained in this office, it was stated that the Bureau
21 releases will be issued as usual. The response to
22 Barabara's release versus the regular Bureau release
23 will be appraised at a later date and a determination
24 will be made about whether to continue the two-fold

1 describe in more detail what is there.
2

3 In fact, in the -- in one of the documents --
4 I think the -- I think it was in the VIMS proposal but I am
5 not absolutely certain of that -- there is -- there is
6 fairly clear evidence that they were unhappy about what
7 they were asked to do by B.L.M. and that they would
8 have preferred to do things in a different way or do other
9 things, but in the RFP, of course, they were given
10 rather rigid guidelines as to what should be done.

11 And it is -- it's largely a descriptive
12 study rather than a study of mechanism, processes and
13 so on.
14

15 (continued next page.)
16

JB flws.
17
18
19
20
21
22
23
24
25

1
2 A No.

3 MR. BIALIX: Will you note the exhibit number of
4 that.

5 THE WITNESS: It's part of 34-4.

6 MR. JENSEN: Visual 4. It's entitled, Vegetation
7 Coastal Zone and Offshore Fisheries, Visual Number 4.

8 Q I will ask you to review that for a moment.

9 A I reviewed it in great detail many times. I
10 really can't get much information from it.

11 Q Doesn't the document contain a list of the
12 major species of fish to be found?

13 THE COURT: Excuse me. It's clear now. The
14 map is clear enough. I must say I agree with the
15 doctor. I have looked at the chart, and the chart
16 doesn't compare to the kind of information he has on
17 these other charts. I was curious about it because I
18 wanted to see where the fish were that I looked for
19 for many years. And you can't tell anything from your
20 chart. You can tell it from the doctor's.

21 All right. Let's move on to something else.

22 (Continued next page.)
23
24
25

1
2 A Let me get addressed again. Okay. Well,
3 I think that would possibly help clarify the point I was
4 trying to make before the break, so if I can refer to --
5 this is Exhibit 28 -- as an example, if we -- we are talking
6 about near-shore spills, and just to -- for the sake of
7 argument let me hypothesize a pipeline from the tract
8 regions to say the New Jersey coast somewhere, and I will
9 without -- just arbitrarily draw a straight line here towards
10 Monmouth. And the kind of analysis I was speaking of would
11 attempt then to say:

12 "Well, we have a hypothetical pipeline
13 corridor area, it's one which is one of the possible ones
14 laid out in the analysis," for example. Then we could
15 take along that pipeline route and postulate hypothetical
16 events. So we might at some point near the shore pose
17 the question: "Well what if the spill of a certain
18 magnitude occurs at a certain time of the year at some
19 specific location?"

20 And then using the kinds of models, simulation
21 models with appropriate changes to deal with coastal
22 situations, attempt to do a simulation which tracks the
23 spill and shows where that oil might impact.

24 This kind of analysis I believe, near-shore
25 kind of spill analysis, an attempt was made to do that in

the work by Stewart & Devanney, 4 CEO.

What this would do, it would then allow us to say -- to take a look and if for all the important populations we are concerned with -- in this case we are looking just at the surf clam so we can just focus on that particular one -- but we would be able to address the question then of is there any significant likelihood that the fishing grounds for this important shellfish are in fact threatened by albeit hypothetical but examples of specific scenarios of the kind of things we would expect to occur.

And to carry that further, it would be possible to say, map the various coastal habitats, sand beaches, eelgrass areas, salt marshes, salt ponds, rocky shores, if any exist, although I am not aware of any in this region -- map these habitats say on a spacial scale, let's pick maybe -- pick arbitrarily for the purpose of discussion say every mile, make that kind of a mapping of the habitats along this coastline, then superimpose the results of a -- of a spill simulation, and we could begin to get some idea of specifically what habitats, what wildlife regions are impacted.

We could get an idea of the -- a better idea, a closer handle, a more quantitative handle, a more specific handle on what the potential impacts might be.

1 5 Moore - direct

2 That -- so this kind of mapping is exactly
3 appropriate to being used in some sort of an overlay
4 analysis in which you take spill trajectories, hypothetical
5 spill trajectories and lay them -- the results of them
6 over this kind of analysis and you can look at both over-
7 lays of probabilities and overlays of actual distribution
8 of oil and begin to lay out the ranges of possibilities
9 in some specific and quantitative form.

10 Q Have you, in your previous scientific investi-
11 gations, participated in any mapping of the habitats and
12 critical areas along the south shore of Long Island?

13 A Yes, in the-- one of the studies I referred
14 to in the beginning of my testimony that I have been
15 involved in we prepared, I believe it's four maps showing
16 various habitats and other biological groups which we
17 felt were important and mapped these on maps of the south
18 shore of Long Island.

19 Q I show you Plaintiff's Exhibit 49 through
20 52 and ask you whether the exhibits depict the areas that
21 you mapped?

22 A Yes, this -- there should be four maps here.
23 Yes, these are the -- these are the four maps. The one
24 marked Exhibit 49 deals with the distribution of habitats
25 along the southern coast of Long Island, specific high

6 Moore - direct

energy beach eelgrass, salt marsh, mussel beds, rocky shores, protected sand bottom and protected mud bottom.

Additionally, it shows a -- what's called pelagic coastal and pelagic estuarine environment, and these -- each of these habitats are then mapped along the south shore region.

THE COURT: All right, mark them in evidence, please.

THE CLERK: Plaintiff's Exhibits 49 for identification, marked in evidence.

(So marked.)

Q Before you proceed to the next exhibit, is this the type of mapping, referring to 49 in evidence, that you're saying should be part of the data base for a near-spill trajectory information analysis for the New Jersey coast?

A It's an example of one way to go about the problem, yes.

Q Would you continue with the next exhibit, please.

A The next exhibit is marked No. 50. This again is mapping in the same region, the south coast of Long Island, and in this case its major preservation areas along the coast according to government jurisdiction,

7 Moore - direct
county, state, federal and local and private.

The last category is a combined category,
local and private together.

And the next map is marked 51. This shows
the distribution of major water-fowl feeding and nesting
areas in the south coast -- southern coast of Long Island,
and according to two categories, outstanding value and
high value.

THE CLERK: Plaintiff's Exhibit 51 is marked
in evidence.

(So marked.)

THE WITNESS: The fourth map is No. 52.
This is distribution of the major shellfish beds
on the southern coast of Long Island, and it
includes the bay scallop, oyster, surf clam and the
surf clam is broken down according to high production
and low production. Softshell clam, hard clam
and the hard clam category is also broken down
according to high production and low production.

THE CLERK: Plaintiff's Exhibit 52 for
identification, is marked in evidence.

(So marked.)

BY MR. LIKE:

Professor Moore, I show you Plaintiff's Exhibit

53 for identification and ask you whether this represents a composite drawn to a different scale of the same habitat and critical areas that were depicted on the exhibits which I have just marked in evidence?

A Yes. I don't believe this was actually prepared by us but it is the same information and I have looked at it and it appears to reproduce the same distributions.

THE COURT: Mark it.

THE CLERK: Plaintiff's Exhibit 53 for identification, marked in evidence.

(So marked.)

BY MR. LIKE:

Q Do you have any examples that you would care to comment on in the final environmental statement as to the conclusions drawn with respect to the near-shore impacts?

A Yes, I do, and I am just -- the question of near-shore spills is -- is discussed in several points in the statement. The problem is not that it's not identified; my concern is that it would be possible using the kind of analysis I have described or some other one which I am sure could be developed to try to quantify and provide a clear interpretation of what the impacts might be.

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Let's see, for example on page -- in Vol. 2 Page 131 to 132, the -- there is a paragraph on those two pages starting at the bottom of Page 131 and going over to Page 132 which describes the conclusions -- excuse me -- this is a summary of the possible impacts from the proposed sale under the category of "Impact on Fish."

Well, I won't read this whole thing. This particular statement concludes, "If such spills are extensive enough whole year classes of fish from affected spawning grounds could be decimated or even eliminated."

Well, in order to -- I mean yes that could happen. The question again is what's the -- what's the likelihood of that occurrence happening, what's the -- how extensive a spill would have to be -- what's a scenario that's extensive to create that kind of situation, what are the conditions that would cause that.

Let me go to another example because that one doesn't get quite the same -- quite what I had in mind.

In the discussion of impacts on -- on benthic organisms, benthic communities, Page 136, the first and second paragraphs describe the summary conclusions concerning impacts on the subtitled benthic communities. Near-shore areas have previously been shown to suffer the

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Moore - direct

1 greatest losses. If a spill should occur as a result of
2 this proposed sale high mortalities can be expected.
3

4 This will especially be true for the more
5 extensive and exposed forms such as the epi-benthic
6 community. In previous spills involving crude oil mor-
7 talities were more apt to be due to smothering organisms
8 rather than direct toxicity.

9 The smothering of organisms is less likely
10 in open and dynamic areas. This especially applies to the
11 mid-Atlantic area where open beaches are prevalent. While
12 initial adverse impacts may be high in the spill site and
13 areas of spread, recovery is expected to occur in a short
14 time."

15 And then the -- then it goes on in the next
16 paragraph to say, "Geographic areas most susceptible would
17 be along tanker routes possibly into New York Harbor or
18 Delaware Bay and more remotely Chesapeake Bay and pipeline
19 route possibly into New York, New Jersey, Delaware and
20 Maryland."

21 And then it concludes, "For a discussion of
22 possible and probable pipeline occasions refer to
23 Section so-and-so."

24 Let me go back and -- having read all that --
25 and comment about it. This clearly identifies near-shore

11 Moore - direct

1 spills as a potential problem. The kinds of questions
2 that occur to me about this analysis would be, what's the
3 likelihood that a very important resource such as
4 Chesapeake Bay is affected by a near-shore oil spill.
5 If we -- if we know the corridors even generally, it's
6 possible to -- to make some sort of spill simulation,
7 as was done for offshore spills, to get an idea of where
8 the oil might be transported if it's spilled at various
9 possible locations.
10

11 And this could lead to some measure of the
12 probability of spills impacting various regions of the
13 coastline.

14 Secondly, if the spill impacts a coastline,
15 how many miles of coastline are we talking about? Are we
16 talking about a spill that is a possible spill scenario
17 that would lead to an entire oiling of the entire
18 Chesapeake Bay or are we talking of something much more
19 limited than that?

20 How long would we expect these regions
21 to take for -- for recovery? And this is a question I have
22 talked about before. The statement indicates a short time.
23 The data that's available for various types of habitats
24 would indicate that five to ten years is -- is probably
25 a minimum time for recovery. And further analysis may be

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2 A I was very disappointed. Given the intensity
3 of debates, the large amount of literature in professional
4 journals, I expected a more balanced assessment of different
5 options.

6 More specifically, I was disturbed at the
7 framework used to evaluate the different options, the static,
8 timeless analysis that ignored the future.

9 I was disturbed that the PDOD did not discuss
10 the uncertainty, the range of opinions that exist about --
11 about the different projections that they were discussing. I
12 was concerned about the discussion of the conservation option
13 that I felt was misleading.

14 I was especially upset that the PDOD did not
15 in its analysis address the existence of the Organization of
16 Petroleum Exporting Countries, the producers' cartel that
17 precipitated the so-called energy crisis.

18 Finally -- and this is the reason why I am here
19 -- I felt that there should have been some discussion of an
20 important option, the use of the outer continental shelf as
21 a standby production capacity, to use the term that was
22 surfaced yesterday by Mr. Hyman, an oil weapon to deter price
23 increases and embargos in the future.

24 And this is an option that I discuss in my book
25 and I presented in 1973 in testimony to the CEQ, the Council

Newlon-direct

on Environmental Quality.

Q Would you please take each of your concerns and give us the basis for your opinion as to inadequacy in each particular instance.

A The programmatic PDOD cost at the cost of producing oil from the outer continental shelf with the cost of conservation. Their proxy for this cost or measure of the cost is the current price of oil, with the cost of energy from different conventional and non-conventional sources and the cost of continuing to import oil at present levels or at an increasing level. These cost estimates are adjusted to include a discussion of environmental costs.

The conclusion that the PDOD reaches from this comparison is that the oil from the outer continental shelf would be cheaper than energy from alternative sources, and there would be the same or even less degradation of the environment from the use of -- use of the oil from the outer continental shelf.

My first concern is that this analysis completely left out the future. There is no discussion of the cost of using oil now, the cost to future generations of using up an exhaustible resource.

In a competitive market a businessman weighs the profits that he can secure immediately from producing a

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2 resource that he owns and selling it. He weighs that, sets
3 that against the profits that he could secure in the future.
4 He also includes the rate of return on the investments that
5 he could make if he produced the resource, sold the resource
6 now and invested the proceeds.

7 If he feels that it's more profitable to hold
8 the resource off the market in anticipation of an increase in
9 price, then he will do so. This will decrease the supplies
10 of the resource now, driving down the price,-- excuse me,
11 pushing up the price. It will increase the availability of
12 the resource in the future, thus decreasing future prices.
13 This is the way the market in effect compared the present with
14 the future.

15 Now, we are talking in the case of oil on the
16 outer continental shelf not about a resource that's privately
17 owned but a resource that's publicly owned. We are talking
18 about a decision process in which the government is going to
19 lease for development -- and as you know, presently we can't
20 distinguish between leasing for development and leasing for
21 exploration -- the government leases for production oil on
22 the outer continental shelf.

23 Now, what I think the PDOD should have done was
24 to do the same type of comparison that a private businessman
25 does, to compare the profits that would be secured in the

Newlon-direct

future from holding the oil off the market, that is the benefit the future generations economically from the oil, with the profits to be secured right now.

Q Excuse me, Dr. Newlon --

A Yes?

Q -- in your opinion would a prudent businessman have made such comparison of present and future?

A Yes.

Q Would a prudent administrator charged with the administration of a public resource have been required to make such comparison?

A Yes.

Q Continue, please.

A The second concern that I raised dealt with the conservation options. The PDOD contrasts the cost of producing oil on the outer continental shelf with the price of oil. The price of oil is the measure of the cost of energy conservation.

Now, there are two problems with this comparison: First of all, the use of the current price of oil as a measure of the cost of energy conservation neglects the distinction between the short run, where it's difficult to make adjustments, where time is -- you are not allowed the time necessary to adjust, to shift, where you have made

Hawlon-direct

supplies that have been held off the market.

Now, if we follow what is being recommended to us in security grounds on bring on the oil regardless of what the oil exporting countries do, then we don't have any oil weapon -- to use the term that was used yesterday. We don't have any oil weapon in 1980 or 1985.

THE COURT: I know. But nations live from day to day just like people. In 1935 we will have an entirely different government in being here and they may feel that survival until 1985 suffices. You have a longer --

THE WITNESS: Time horizon.

THE COURT: (Continuing) -- time horizon than the people in charge.

THE WITNESS: Well --

THE COURT: You may be right or they may be right. But I find this all very interesting.

MR. BIALIK: With all due respect, I think our point is that NEPA requires that Government think in terms of long-range, consider long-range options.

THE COURT: You may be right in this context. I look forward to your brief in the context of the hearing.

Newlon-direct

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2 MR. BIALIK: It is not a question of the
3 SEcretary reaching a snap decision, that we have got
4 to do this now. He does have to consider the
5 alternatives and study them.

6 THE COURT: It is your position, I take it,
7 Mr. Newlon, that the PDOD has to be considered as an
8 integral part of the impact statement.

9 THE WITNESS: Exactly.

10 THE COURT: And the impact statement cannot be
11 understood without considering the PDOD; is that it?

12 THE WITNESS: Yes. And my concern has been all
13 along with the lack of imagination in the area of
14 energy policy and the unwillingness to consider --
15 consider options. And outside of a few set options
16 which surface over and over again in the debate. And
17 I have raised repeatedly within the government and
18 outside the government this option. And repeatedly I
19 have had the same response. And this is -- and the one
20 that I got at the CEQ hearings was that everybody
21 leaned back and said, "My, that's interesting. Sounds
22 very plausible. Why don't you come down and talk to
23 our staff?"

24 And so I go down and talk to the staff. And
25 they say somebody should do a simulation of this and

Newlon-direct

BY MR. LIKE:

Q Dr. Newlon, would the criticism which you have leveled against the programmatic PDOD also apply to the PDOD sale 407

A I believe so. Yes.

Q Do you regard either of those documents as of usefulness to a decision-maker?

A AS I said before -- and it came out and I think it surfaced very well in the discussion -- the actual considerations that entered into the decision-making process are not in the PDOD. I think that the PDOD is -- in a way gives us the illusion of an analysis, an illusion of a cost benefit comparison. It's not done well professionally and it masks the real issues that determine the decision. And I think those real issues should be surfaced and can be surfaced in a rational objective fashion.

Q In your opinion, would a prudent administrator charged with the administration of the public resources of OCS lands be justified on the basis of the PDOD's in making a decision to accelerate OCS leasing and in particular making a decision to hold the sale 407

A No.

THE COURT: I don't think your question is general enough, just for the record, because you

Newlon-direct

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1 haven't included these other documents he had before
2 him.
3

4 MR. LIKE: I am sorry, your Honor. The question
5 should --

6 THE COURT: Unless the witness is testifying
7 that the PDOD is the only thing that he -- that was
8 worth relying upon. I just don't understand the
9 nature of the question.

10 MR. LIKE: The nature of the question, your
11 Honor --

12 THE COURT: There is a serious issue as to
13 whether the PDOD is a relevant document here.

14 Q To the extent, then, that the PDOD was used by
15 the decision-maker as a document upon which his decision was
16 based, I put the same question to you.

17 A My answer is the same, no.

18 MR. LIKE: Your Honor, I would like to offer
19 in evidence the book which develops more fully
20 Dr. Newlon's position with respect to the oil security
21 system.

22 THE COURT: All right. Mark it in evidence.

23 THE WITNESS: Let me add something that is
24 obvious -- or should be obvious, but I forgot to note
25 it in the beginning. I'm not here in an official

Newton-cross/Jensen

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2 and this was in response to a question from the Court --

3 A Yes.

4 Q (Continuing) -- the PDOD has to be considered
5 an integral part of the impact statement. That was the
6 question posed to you, and I think your answer was yes?

7 A I don't recall that -- that exchange.

8 Q Well, is that your opinion, that the PDOD has
9 to be considered an integral part of the impact statement?

10 A My understanding -- we have gone through my
11 understanding of what the PDOD is and it isn't. I can
12 rehash that --

13 Q No, all I want to know is what your opinion,
14 if you gave one, would be based on this kind of understanding
15 that you just testified about?

16 MR. BIALIK: Your Honor, I object. I don't
17 think there is any relevance to what this witness
18 thinks on this question.

19 THE COURT: Overruled.

20 MR. JENSEN: He gave testimony that --

21 THE COURT: You may inquire.

22 THE WITNESS: Yes, I believe that the PDOD
23 should be an integral part of assessing the impact of
24 leasing. I think that in something as important as
25 leasing on the outer continental shelf, where there

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2 are security issues, where there are environmental
3 issues, where there are substantial economic issues,
4 that there should be a document that describes the
5 decision-making process on which -- and justifies the
6 decision that's been reached.

7 And the PDOD, Programmatic PDOD, my under-
8 standing was that the Programmatic PDOD described that
9 decision-making process, that overall decision-making
10 process on which the decision for accelerated leasing
11 for the outer continental shelf was based, and I think
12 it's important in the case of accelerated leasing to
13 have such a document.

14 Q Was this understanding also obtained, you know,
15 your gut feeling, in your conversations with Mr. Like in which
16 you --

17 A My feeling as a non-lawyer and a non-political
18 scientist, but as a private citizen I feel that -- that this
19 type of process is very necessary. Also, as a person who has
20 worked in the Government for a number of years I think it's
21 extremely important that we do something to change the quality
22 and improve the quality of analysis that goes on in the
23 Government. I think in the case of disclosure of the decision-
24 making process this -- what this is going to do and what this
25 is doing now, if the courts uphold -- if the courts refuse to

Newlon-cross-O'Hara

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2 A Yes. I have given consideration to natural
3 gas. My views on natural gas is that the problem in the
4 natural gas are largely due to the price regulations mess and
5 less a problem of leasing. And that if we had reasonable
6 price regulations, you would -- a lot of the shortage in the
7 natural gas would disappear.

8 (Continued next page.)
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Donkin-direct

THE COURT: Yes?

MR. LIKE: Your Honor, several foundation questions before Mr. Donkin is turned over for cross-examination.

THE COURT: All right.

Q In preparation for your testimony did you review the Programmatic Decision Option Document?

A Yes, I did.

Q Did you also review the Mid-Atlantic Programmatic Decision Option Document for Sale No. 40?

A Yes.

Q For the benefit of the Court, since the Court has not had an opportunity to look at the pre-filed testimony that you prepared, will you summarize the basic findings that are contained in your testimony?

A Yes. In terms of conventional petroleum resources, there are a number of alternatives to holding OCS Sale 40 this month. In my view these alternatives are far superior to leasing in a frontier area, inasmuch as the potential oil and gas reserves associated with these alternatives -- these sources would include non-producing leases in the Gulf of Mexico from which gas reserves have already been -- at which gas reserves have already been drilled and discovered, non-producing gas reservoirs at

Donkin-direct

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2 producing leases in the Gulf, producing reservoirs in the
3 Gulf of Mexico both oil and gas which currently are not
4 being produced at anywhere near their maximum productive
5 capacity, plus an extremely large inventory of leases not
6 categorized in the preceding categories, many of which have
7 not yet been subjected to exploratory drilling.

8 In fact, the inventory of leases in the Gulf
9 of Mexico today are greater than at any time in the past.

10 In addition to alternative conventional
11 sources in the Gulf of Mexico there are a large number of
12 onshore potential sources which the authors of both the
13 Programmatic PDOD and the Mid-Atlantic PDOD attached very
14 little weight to. However, available evidence in terms of
15 recent significant onshore discoveries, particularly with
16 respect to natural gas, would seem to indicate that the
17 future potential onshore is much greater than that projected
18 by the Interior Department.

19 In terms of specific criticisms of the
20 Programmatic PDOD, this morning Dr. Newlon also discussed,
21 for example, the potential benefits of conservation as an
22 alternative to accelerated leasing, and as I recall, your
23 Honor indicated that many of these alternatives, for
24 example legislation regarding automobile efficiency and
25 insulation in homes, is beyond the authority of the Secretary

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2 your Honor. There may be oil and gas reserves in the
3 mid-Atlantic, and then again there may not be. Industry
4 paid \$1.5- billion for about 90 leases off the coast of
5 Mississippi, Alabama and Florida in December of 1973.
6 Nothing but dry holes out there. True, the federal
7 government got 1.5-million. But 1.5-billion of
8 production and developmental activity elsewhere,
9 perhaps in the central Gulf in the Louisiana and
10 Texas areas, was essentially foregone. And when you're
11 talking about frontier areas, you have to recognize
12 that there is a risk factor associated with those
13 reserve estimates.

14 Sure, there might be 2.8 TCR or 29 TCF relative
15 to those 154 tracks associated with sale 40. And then
16 again there may be zero. But we are pretty confident
17 that the Gulf of Mexico is a rather prolific producing
18 region.

19 THE COURT: What are we talking about in terms
20 of exploration? How much money is required to conduct
21 the exploration phases in 40?

22 THE WITNESS: It's in the PDOD. I think they
23 estimated a well costs -- \$3-million per well, and
24 \$1.2-million for a developmental well.

25 Do you want to include the lease bonuses?

Donkin-cross-Jansen

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2 THE COURT: No. Just assuming that we are
3 concerned with tying up capital otherwise required or
4 desirable, as you suggest, for production, without
5 loss of exploration so that you can make future
6 decisions.

7 THE WITNESS: Well, the PDOD estimates the cost
8 of drilling exploratory wells at between 180-million
9 and \$720-million, depending upon the quantity of
10 reserves found. And that \$3-million is -- it seems
11 high. But \$3-million per well is the figure that
12 that's based on. That will get you 30 exploratory
13 wells of the -- if the costs are the same in the Gulf
14 of Mexico.

15 THE COURT: I am sorry. I didn't follow that
16 answer. That's \$90-million for the 30 wells? Is that
17 enough to explore 40?

18 THE WITNESS: No. The estimate in sale 40 is
19 \$180-million. I'm assuming that the cost per well
20 are the same. But it seems to me that --

21 THE COURT: 30 wells would be needed.

22 THE WITNESS: The \$3-million per well is quite
23 high relative to exploratory drilling costs in the
24 Gulf. It may be the case. In fact, I haven't
25 examined this. That wildcat drilling in the Gulf

Donkin-Cross-Jensen

of Mexico costs a bit less than that.

THE COURT: In any event, they would be roughly half a billion dollars frozen into government funds and not presumably in oil exploration or production if lease sale 40 goes through, and you're suggesting that the industry ought to be using that half a billion dollars in the Gulf of Mexico more productively?

THE WITNESS: I am suggesting that we would in all probability develop far more oil and gas, and much sooner, in the Gulf of Mexico for equivalent expenditures where we simply were to continue to developing the non-producing -- the producible shut in reserves and leases, reservoirs and leases, and increase production at producing reservoirs were appropriate up to levels approximating the maximum desirable rate of production.

THE COURT: What would you do with 40? Explore it or lease it?

THE WITNESS: Well, certainly during the next three or four years, it seems to me that the decision relative to 40 could be postponed.

THE COURT: Not even explored.

THE WITNESS: I don't see, your Honor, a pressing need for sale 40. Perhaps in four or five

Donkin-Cross-Jensen

years.

THE COURT: Forget about the sale. I am not raising the question of who does the exploring. Putting that aside, would you explore 40, assuming from what you say --

THE WITNESS: Perhaps I am not understanding your question. Are you asking --

THE COURT: Exploration could be by the government.

THE WITNESS: Yes.

THE COURT: We are talking about the use of capital. And we were assuming that half a billion dollars of capital otherwise available for exploration and production would be tied up were there a sale this month? Is that so?

THE WITNESS: Yes. You raise an interesting point. If we consider the separation of exploration from production --

THE COURT: That's what I am getting at.

THE WITNESS: As an alternative.

THE COURT: If the government or anybody laid out a hundred billion -- a hundred billion, could they explore 40 sufficiently to find out what is there?

Donkin-cross-Jensen

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2 THE WITNESS: Well, they would have a heck of a
3 better idea as to what is there than they have now.
4 A hundred million is the figure.

5 THE COURT: That would give you about 45 wells.

6 THE WITNESS: Well, it will give you somewhere
7 in that neighborhood.

8 THE COURT: Is that sufficient? I don't know.

9 THE WITNESS: It seems to me that it would be
10 far superior to have the government drill maybe 15 to
11 30, 35 wells out there and get a pretty good idea
12 as to what in fact the potential is than to lease it
13 in this point of time.

14 THE COURT: Will 15 to 30 wells or 30 or 40
15 wells pretty much tell you whether there is oil or gas
16 out there?

17 THE WITNESS: Well, you're talking about 154
18 tracks. Okay. Now, obviously, I'm not going to
19 recommend that the government go out there and drill 30
20 holes without having any knowledge as to where they
21 should be drilling those holes. They could do what
22 industry does. They could purchase the seismograph,
23 the geological and geophysical data. They could
24 interpret it. They could also contract out to other
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Donkin-cross-Jensen

1 consultants who interpret such data. They could
2 contract out to the drillers. And based upon the
3 results of the initial drilling make a determination
4 as to where, for example, if at all, the ultimate
5 reserves lie relative to the range of estimates
6 contained in this PDOD.

7
8 It seems to me that that is a very viable
9 alternative.

10 THE COURT: Well, as an economist and somebody
11 reading these impact statements and other statements
12 that the Secretary had, is there sufficient analysis
13 of this problem of where capital is being used and where
14 it would best be used? I am concerned particularly
15 in the question about the half billion dollars. But I
16 suppose there are many other costs.

17 THE WITNESS: That's right. This half billion
18 dollars relates certainly to the bonuses.

19 THE COURT: That is a sizable amount of cash
20 that is frozen.

21 THE WITNESS: Yes. That is correct.

22 THE COURT: Would that otherwise be available
23 for exploration and development in the Gulf?

24 THE WITNESS: Well, assuming --

25 THE COURT: Or is this new capital that is

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2 generated? I don't know enough about this.

3 THE WITNESS: It all depends as to whether or
4 not you're talking about a major oil company or a
5 large independent or a small independent. But then
6 the way the leases --

7 THE COURT: Are these problems discussed --

8 THE WITNESS: I believe that the --

9 THE COURT: -- in the statement?

10 THE WITNESS: I believe the PDOD for sale 40
11 had a much lengthier discussion of the capital
12 requirement than the programmatic.

13 THE COURT: And does it discuss the most
14 useful way of using that half billion dollars at this
15 point in order to rapidly increase the --

16 THE WITNESS: No, your Honor. It really didn't
17 consider the alternative of an additional development
18 in the Gulf versus frontier areas. And I know that
19 the programmatic didn't consider the possibility of
20 enhancing the Gulf of Mexico production at all.
21 They listed those four alternatives. And I was really
22 surprised when I didn't see that listed as one.

23 THE COURT: Is there more capital required for
24 secondary and tertiary development.

25 THE WITNESS: It is a very expensive proposition.

Donkin-cross-Jensen

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2 THE COURT: ASSuming you have a secretary or
3 a -- and I am not trying to denigrate him. I have no
4 evidence as to his background before me. I suppose I
5 could take judicial notice what is said in who's who
6 about him. I don't know whether he's an engineer or
7 an economist, or what his --

8 MR. HYMAN: Businessman. He's in the wax
9 business.

10 THE COURT: What?

11 MR. HYMAN: Wax business.

12 THE COURT: Wax business. I don't know. Let's
13 assume he's an average intelligent well-informed man.
14 Could he -- who doesn't know much about the oil
15 business.

16 And wax, I suppose, comes from oil. But he
17 doesn't know much about the oil business generally.

18 Could he make an intelligent decision based
19 -- that's acceptable to you as an economist, based
20 upon these documents that he had.

21 THE WITNESS: I don't believe so, your Honor.
22 It's more or less what I was attempting to address in
23 my prepared statement.

24 THE COURT: Could a reasonable set of
25 alternatives understandable by a lay person have been

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2 put together with the data now available that would
3 satisfy you as an economist who was to present it to
4 a decision-maker?

5 THE WITNESS: I am fairly confident that it
6 could have been. Yes.

7 THE COURT: All right.

8 Q I would like to return to this question of
9 capital briefly for a moment.

10 Now, in talking about the capital needs for
11 OCS sale number 40, you implied that there would necessarily
12 be a diversion of capital from Gulf activities in order to
13 meet the capital requirements here; is that correct?

14 A Yes.

15 Q But doesn't that take a very fixed view of what
16 capital is? I mean, couldn't we also just as easily assume
17 that the capital requirements will be met by capital coming
18 in from other sections of the economy, increased bank loans,
19 or however the companies raise capital to --

20 A At a cost.

21 Q At a cost. But the capital is there, is it
22 not?

23 A Well, if we assume that capital markets are
24 perfect, capital will typically be forthcoming provided that
25 the borrowers are willing to pay the price. However, you

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2 Q Isn't there -- isn't this very subject of
3 the capital structure of the oil industry and their ability
4 to obtain financing or new sources of capital discussed
5 at some detail in appendix C in the sale 40 PDOD?

6 A There is a rather length discussion of the
7 ability of the industry to acquire the necessary capital
8 to drill the leases relative to sale 40.

9 Q And don't they say in that discussion that
10 there might be a problem, that the total energy capital
11 demands might outstrip the available capital supplies in the
12 economy?

13 A Yes, but they really don't address the impact
14 that that's going to have on the capital necessary to
15 develop the Gulf of Mexico, the on-shore fields, to complete
16 the last Canadian pipeline, and things of this nature.

17 THE COURT: No, that's the point. I think
18 the cross-examination has developed that nicely.
19 It hadn't occurred to me earlier.

20 MR. JENSEN: Well, I have not had a chance
21 to review the entire document, but there is an
22 extensive appendix to 40 PDOD discussing this point.

23 THE COURT: Well, of course, you will have
24 a chance to brief it. I suppose everybody will want
25 to brief this to incorporate an analysis of the

Donkin-cross/Jensen

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2 By the same token, you are probably not as
3 likely to discover unless you go to deep depths, and that
4 wouldn't be the case here, you wouldn't be as likely to find
5 major new reserves because your other wells would have found
6 them already. So you can find new reserves that are not
7 going to be giant fields through this type of developmental
8 drilling.

9 Q Right. Were you testifying that the best
10 opportunity for this nation's industry to find substantial
11 significant big reserves of oil and gas is to continue its
12 operations in the Gulf of Mexico, as opposed to frontiers
13 such as the Atlantic and Gulf of Alaska?

14 A Well, I am told that the Gulf of Alaska is
15 likely to have substantial reserves. The range of reserves
16 estimates relative to OCS Sale 40, for example, is not
17 nearly as large as it has been for many of the recent sales
18 in the Gulf of Mexico.

19 So with respect to Sale 40, if we are lucky
20 and if we are at the upper end of the range I am fairly
21 confident that that would ultimately some time down the
22 road generate a larger incremental reserve than drilling
23 developmental wells in currently -- into currently
24 producing reservoirs.

25 But I'm not saying and I would not agree that

1
2 production in the near term if producible shut-in leases were
3 brought onstream, if new well completions took place.

4 Let me just see if I could give you an estimate
5 here. Let's say that we are somewhat near the midpoint of that
6 range for the producible shut-in leases and let's assume
7 six trillion cubic feet. And there were another 1.2 trillion
8 cubfeet that could be, that would be commercial at prices
9 between 55 cents and a dollar, but that was just a sample, so
10 let's add another three or four trillion.

11 Q Are you using figures that you have used in
12 your testimony?

13 A Yes.

14 Q I couldn't remember. Go ahead.

15 A That's at least ten trillion cubic feet.

16 Q Are these reserves, reserve figures? These are
17 reserve figures, of course, yes.

18 A Yes. Now, in the Gulf of Mexico you can probably
19 produce at least ten per cent of the recoverable reserves the
20 first year. That's what Exxon says. They made a submission
21 to the FPC for the natural gas survey. So if you have got
22 -- if you have ten trillion cubic feet you'd be able to
23 produce 275,000 a day out of that.

24 And what about the MER issue? You are
25 interested in that, too, I presume?

Donkin-cross/Lafitta

service and are not planning to attach any new customers.

That's a general statement. They may be--

Q Are you familiar--

A There may be exceptions.

Q Are you familiar with the information which the Federal Power Commission issued on June 8, 1976, in connection with its summary of FPC Form 15 data?

A No, I am not familiar with that one, but isn't that the annual report on pipeline curtailment?

Q Yes, and I would show you Defendants' Exhibit O, which is a subsequent order issued on July 20th, ordering an investigation into the impact of curtailments during the coming winter, and ask that you look at Appendix A.

Do you see on Appendix A any pipeline which you know, sir, of the New England area?

A Texas Eastern Transmission Corporation, I believe goes up.

Q Any others?

A I'm not certain whether the terminal point of the Transco System is-- I assume that it serves at least Connecticut. Whether it goes further north--

Q Transcontinental serves the New Jersey and New York area?

A Yes, most definitely.

Donkin-cross/O'Hara

1
2 A Well, if--

3 Q Was that the problem?

4 A If the pipeline was abandoned, there would be
5 less capacity to serve them.

6 Q Were their contracts then being curtailed?

7 A Yes. Curtailments are very high--

8 Q A moment ago you were kind enough to do a
9 calculation and do an estimate of the amount of gas which
10 you thought was available and which might be utilized
11 presently to help offset curtailment. I did not get the
12 number which you calculated, and I wonder if you recall
13 approximately -- I just didn't --

14 A Well, let's do it very simply and then
15 I won't make a mistake on my calculator.

16 I assume 6 trillion cubic feet of reserves
17 relative to the producible shut-in leases. And I'm adopting
18 that as an extremely conservative estimate.

19 Q Well, perhaps I can shortcut this. Please
20 feel free to add whatever you like, but I think rather
21 than going on until you have heard the full question,
22 what would the daily quantity of gas that you believe is
23 readily available -- what would it amount to?

24 A From those two sources, the producible
25 shut-in leases and the non-producing dedicated reservoirs,

Donkin-cross/O'Hara

1
2 it will be roughly one trillion cubic feet a year during
3 the first year.

4 Q A year?

5 A Yes, during the first year. O.K. That is
6 based upon Exxon's estimate of the first year deliver-
7 ability.

8 Q All right. Is that your answer or are you--
9 Did you want to add anything?

10 A I want to give you a daily deliverability.

11 Q O.K.

12 A That makes a big difference. I thought it
13 should be more. 2.7. Is that possible?

14 Q 2.7 what, please?

15 A cubic feet.

16 THE COURT: Three hundred?

17 THE WITNESS: I beg your pardon?

18 THE COURT: 350 days in a year.

19 THE WITNESS: My calculator says 2.7 million
20 cubic feet per day.

21 Q Per day?

22 A Yes.

23 Q Could you translate it to m.m.c.f.

24 A 2,739.

25 Q 2,739.

Donkin-redirect/Like

REDIRECT EXAMINATION

BY MR. LIKE:

Q Mr. Donkin, have you during the recess had an opportunity at my request to review Defendants' Exhibit O in evidence, in particular the table as to which you were cross-examined by Mr. O'Hara concerning the Transco curtailment?

A Yes, I have.

Q And would you please inform the Court what you found with respect to the accuracy of that table?

A There is an obvious typographical error in the column headings. The columns are headed, "MMCF." They should be headed m.c.f.

If that error is taken into account, then my response to Mr. O'Hara's question is that the amount of daily deliverability from the offshore Louisiana producible shut-in leases and non-producing gas reservoirs which are dedicated to interstate pipelines would account for 500 -- approximately 5040 percent of Transcontinental Gas Pipeline Corporations projected deficiency during the winter heating season, November 1976 through March 1977.

Q Instead of two percent?

A That is correct.

Q Tell us how you came to the conclusion that

1
2 should read m.c.f.

3 My answer would be the same for many of
4 these other pipelines here as well.

5 In other words, I'm familiar enough with the
6 capacity of many interstate pipelines to know approximately
7 what their projected level of curtailment should actually
8 be.

9 Q Did you find any reference in the text of
10 that exhibit which is explanatory of the figure which
11 appears in the column, the tables which you have concluded
12 is in error?

13 A Well, at page 2 the following sentence
14 appears:

15 "The data further show that 19 of the
16 pipelines submitting projected curtailment of
17 approximately 20 percent or greater during the
18 forthcoming heating season," and that percentage
19 figure seems to be in line with Transco's.

20 Q Does the text indicate any evidence supporting
21 an m.m.c.f. caption in the table?

22 A No, it does not.

23 THE COURT: Can we dispose of this whole
24 litigation on a typographical error?

25 Q Have you made a comparison of the expected gas

Donkin-Radiant/Like

yield from OCS Lease Sale 40 and your calculations with respect to what could be yielded if the producible gas at producible shut-in wells and dedicated reservoirs were brought up to optimal utilization?

A Yes, I have.

Q Will you please tell the Court what that calculation is?

A If the gas reserves estimated for Sale 40 are at the low end of the range, then the offshore producible shut-in leases and non-producing reservoirs would account for approximately 317,000 -- or 317 percent of the peak daily capacity to be attained in 1989 for Sale 40.

Similarly the figure is 192.8 percent of the estimated -- let me check that again. I think I used a wrong number there.

Yes, at the high end of the range for Sale 40 the Gulf of Mexico leases would account for 87 percent of that figure.

In other words, they could produce slightly less than what is now being estimated for Sale 40 at the upper level of the reserves estimate range.

MR. LIKE: Your Honor, my concluding question of this witness is in the nature of an offer of proof on the anti-competitive issue, which you ruled would not be

entertained.

Q Mr. Donkin, I show you my affidavit dated July 22, 1976, and in particular page 23 -- pages 23 through 25, and ask you whether if you were questioned with regard to the subject matter contained on these pages you would testify in support of the statements contained in the affidavit.

A Yes, I would.

Q And would you have been prepared to introduce in addition to your testimony the documentary evidence in support of the statements contained in my affidavit?

A Yes, I would have.

Q Thank you, Mr. Donkin.

MR. LIKE: I'd like to offer in evidence, your Honor, the Federal Trade Commission staff letter which came about as a result of your Honor's order directing that the PDOD be sent to the Federal Trade Commission and to the Justice Department.

THE COURT: All right.

Do I understand part of your testimony on cross to indicate that if the low priority intra-state use were devoted to the high priority industrial-- or higher priority industrial and home use, that

Dinkin-redirect/Like

much of the shortfall would be overcome?

THE WITNESS: Actually, what I'm saying is this, your Honor: I'm not really aware of any residential curtailments being projected for this year. Now, there may be, but I -- I'm just not aware of curtailments reaching that far.

But then you've got small commercial and high priority industrial uses, and yes, if natural gas service to generate electricity were either ceased within the near future or phased out, that would free up rather large volumes of gas to serve the higher priority uses and it would probably eliminate all curtailments.

THE COURT: If they raised the price, that would have the effect of phasing it out, wouldn't it?

THE WITNESS: In a very real sense, yes. The reason that they--

THE COURT: However, would you have to raise the price so that it wouldn't be desirable to use this stuff locally to generate electricity?

THE WITNESS: Up to the alternative fuel cost.

THE COURT: Which would be about what?

THE WITNESS: And in the Southwest it's about anywhere from \$1.60 to \$2.20 per million btu.

1
2 THE COURT: Congress has refused to give the
3 Federal Power Commission authority to control intra-
4 state use, hasn't it?

5 THE WITNESS: Yes. In fact, they have been
6 waivering between extending jurisdiction to the
7 intra-state market or de-regulating all new sales.
8 It's difficult to say which way they are going to
9 go. I think it's fairly clear that--

10 THE COURT: Either way would have the same
11 effect, wouldn't it?

12 THE WITNESS: Yes. Some people might argue
13 that deregulation is preferable because it will
14 still provide for a sufficient incentive to producers
15 to go out and explore and develop.

16 Others do point out that if you expand juris-
17 diction to the intrastate market, (1) you will get
18 more gas into interstate commerce, and (2) you will
19 get a lot of speculative expectations with regard
20 to price, which lead to withholding, so it's a very
21 debatable issue.

22 MR. HYMAN: Your Honor, one question?

23 RECROSS EXAMINATION

24 BY MR. HYMAN:

25 If the local Texas companies convert from gas

1
2 THE COURT: Well, excuse me. It is site
3 specific in that it suggests four oil corridors, doesn't
4 it?

5 THE WITNESS: No, sir, I believe the suggestion
6 of four corridors for oil -- and this goes back again
7 to the question of 1800 acres, as suggested in
8 Technical Paper No. 1 -- is an assumption that they
9 used in formulating the economic model.

10 THE COURT: There is no reference to four oil
11 corridors in the final environmental statement?

12 THE WITNESS: I am just trying to think.
13 To my knowledge no, sir, there isn't.

14 THE COURT: There is no assumption that oil
15 will be piped in?

16 THE WITNESS: Oh, yes, sir, there definitely is.
17 In fact, there is an assumption that -- that almost
18 all of the oil that's produced offshore will be
19 piped in, because to the best of their ability they
20 are going to try not to utilize tankers and barges to
21 bring this oil ashore.

22 THE COURT: Isn't there an assumption that it
23 will be piped into New Jersey, which is the closest
24 offshore point?

25 THE WITNESS: No, I don't think that's an

Wenstrom-direct

2421

2 assumption. I think that's stated in the form of an
3 example, that it's quite likely that oil may be pumped
4 ashore into New Jersey.

5 Similarly, it's likely that oil might come
6 ashore in Maryland or Delaware. That's the area we
7 are talking about. It has to come to shore some place,
8 and so you could estimate, you could guess --

9 THE COURT: Isn't it more economic to run your
10 pipelines shorter distances?

11 THE WITNESS: In terms of the transportation,
12 economics of oil, yes, indeed, that's correct, but --

13 THE COURT: Where would you suggest that the
14 pipelines, assuming the large end of the strike, be
15 landed?

16 THE WITNESS: I would -- I would not suggest
17 at this particular time a specific location. I would
18 suggest that the selection of those sites has to be
19 made on -- on the basis of criteria that are not
20 solely economic. I would suggest that -- that
21 environmental considerations ought to be brought to
22 bear on that selection process.

23 THE COURT: Such as what?

24 THE WITNESS: Such as the compatibility of a
25 specific area along the beachhead to -- with the --

1 with the pipeline construction effort. I don't necessarily
2 agree with the fact that every spot on the beach is
3 -- is suitable for a pipeline landfall, and I -- I don't
4 think economics ought to be the sole determinant in that
5 situation.
6

7 THE COURT: Well, are you aware of the fact
8 that the states are supposed to participate in the
9 decision with respect to where these pipelines ought
10 to be landed?

11 THE WITNESS: Yes, sir, and I think that's
12 entirely correct.

13 THE COURT: Supposing New Jersey and Maryland
14 decide no pipeline should be landed?

15 THE WITNESS: Then I suppose New Jersey and
16 Maryland and the offshore production industry have a
17 problem.

18 But I think that that would be an entirely
19 unrealistic and in fact an extreme position to take,
20 because I don't think pipeline landfalls are
21 incompatible with every square mile of -- of the
22 ocean front of any of those states.

23 THE COURT: Well, that's a state decision,
24 isn't it, now?

25 THE WITNESS: I would hope that it's a state

Wenstrom-direct

1 decision, that the states would have the authority to
2 exercise that kind of control over their own -- their
3 own beachfront, yes, sir.

4 THE COURT: So if they decide no landing in
5 any place that's economically feasible there is a
6 problem, isn't there?

7 THE WITNESS: Yes, sir, but that -- that kind
8 of a decision is not solely an economic -- or an
9 environmental decision, in my estimation. It's partly
10 a political decision.

11 THE COURT: Yes, but it's a political decision
12 by the states, isn't it?

13 THE WITNESS: Yes, sir, it is. And it should
14 be made, that kind of a decision should be made by the
15 states. They have to take a -- a position in my view
16 on that -- on that very decision.

17 Q Just one final question, Dr. Wenstrom:
18 Dr. Mitchell testified that the area included within BLM's
19 study is larger than the area which will receive actual
20 impacts, and that this tends to make the region sufficiently
21 large so that onshore impact would appear to disappear in
22 this large volume of people. Do you regard that as a valid
23 criticism?
24

25 A Excuse me. No, I don't, and again it goes back

1 to my contention that something like ten to thirty million
2 acres onshore and 900,000 acres offshore is not necessarily
3 a site. It's a region. And I think what we are talking
4 about -- is BLM's analysis, that shows very clearly that
5 certain things happen on a regional scale; other things happen
6 on a very localized or say a county basis type of scale.

7
8 What happens on a regional scale is that you
9 are superimposing a very small program on a very large area
10 containing a very highly industrialized system, with a lot
11 of people in it, basically, and so the changes in your
12 parameters that are reported, for example, in the environmental
13 impact statement are very, are very small changes.

14 BLM reports, for example, as a result of their
15 analysis in Technical Paper No. 1 that most of the parameters
16 which they have examined change over the base case less than
17 one per cent. Well, except for three areas which they list
18 as construction, balance of payments and private industrial
19 development, which change in the area of one to three per cent.

20 I think that's not because of any confusion or
21 attempt to delude people and hide things in a large area;
22 it's simply because the area is indeed very large and the
23 changes are very small.

24 MR. ST. JOHN: No further questions.

25 THE COURT: Any further defense questions?

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DIRECT EXAMINATION

BY MR. HYMAN:

Q Well, Doctor, doesn't the statement talk about pipelines providing they are feasible? It talks about economic feasibility and technical feasibility?

A Yes, sir, I think you have to look at the question of feasibility from at least three different aspects.

Q Okay. Well, if the state along the coast refused to allow pipelines to go through their limit of the continental shelf, the three-mile limit, or onshore, are there other alternatives available to oil companies to bring that oil ashore?

A Well, when you come right down to it there are only two means of transporting oil from offshore to onshore: pipelines; the second to utilize some type of vessel, either a barge or a tanker. Not using pipelines of course would require the oil industry to a greater degree to rely on tanker or barge traffic.

Q That type of technology is presently available to us; is that correct?

A Yes, sir. In fact, the existing ports along the East Coast have an extremely high volume measured in terms of tons of crude petroleum traffic today.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COUNTY OF SUFFOLK, et al.,

Plaintiffs-Appellees,

against

DEPARTMENT OF THE INTERIOR, et al.,

Defendants-Appellants.

THE STATE OF NEW YORK, et al.,

Plaintiffs-Appellees,
against

THOMAS S. KLEPPE, etc.,

Defendants-Appellants.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON

being duly sworn, deposes

and says that he is over the age of 18 years. That on the 23rd
day of September, 1976, he served two copies of the
Brief of Appellee Suffolk County on
see attached list

the attorney for ~~the~~ see attached list

by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorneys at
No. See attached list () N. Y.,
that being the address designated by them for that purpose upon
the preceding papers in this action.

David F. Wilson

Sworn to before me this

23rd day of September, 1976.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 31, 1978

John Picciano, Esq.
Attorney for County of Nassau, Appellee
Nassau County Executive Building
West Street
Mineola, New York 11501

E. Edward Bruce, Esq.
Covington & Burling
Attorney for Appellant Oil Industry
888 Sixteenth Street, N. W.
Washington, D. C. 20006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COUNTY OF SUFFOLK, et al.,

Plaintiffs-Appellees,

against

DEPARTMENT OF THE INTERIOR, et al.,

Defendants-Appellants.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes
and says that he is over the age of 18 years. That on the 23rd
day of September, 1976, he served two copies of
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for See attached list
by delivering to and leaving same with a proper person in charge of
their office at See attached list
in the ~~XXXXXX XXXXXXXXXXXXXXX~~, City of New York, between
the usual business hours of said day.

David F. Wilson

Sworn to before me this
23rd day of September, 1976

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 23, 1979

Joseph J. Zedrosser, Esq.
Assistant Attorney General of the
State of New York
Two World Trade Center
New York, New York 10047

David G. Trager, Esq.
United States Attorney for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Cullen and Dykman, Esqs.
Attorneys for Defendant-Appellant
New York Gas Group
177 Montague Street
Brooklyn, New York 11201

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COUNTY OF SUFFOLK, et al.,

Plaintiffs-Appellees,

against

DEPARTMENT OF THE INTERIOR, et al.,

Defendants-Appellants.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN, being duly sworn, deposes
and says that he is over the age of 18 years. That on the 23rd
day of September, 1976, he served two copies of
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for see attached list
by delivering to and leaving same with a proper person in charge of
their office at see attached list
in the Borough of Manhattan, City of New York, between
the usual business hours of said day.

Irving Lightman

Sworn to before me this

23rd day of September, 1976.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978

Kommel, Rogers, Kaufman, Lober
& Shenkman, Esqs.

Attorneys for Natural Resources Defense Council, Inc.,
Appellee

380 Madison Avenue
New York, New York 10036

Sarah D. Chasis, Esq.

Attorney for Natural Resources Defense Council, Inc.,
Appellee

15 West 44th Street
New York, New York 10036

William F. Dudine, Esq.

Attorney for Concerned Citizens of Montauk, Inc.,
Appellee

405 Lexington Avenue
New York, New York 10017